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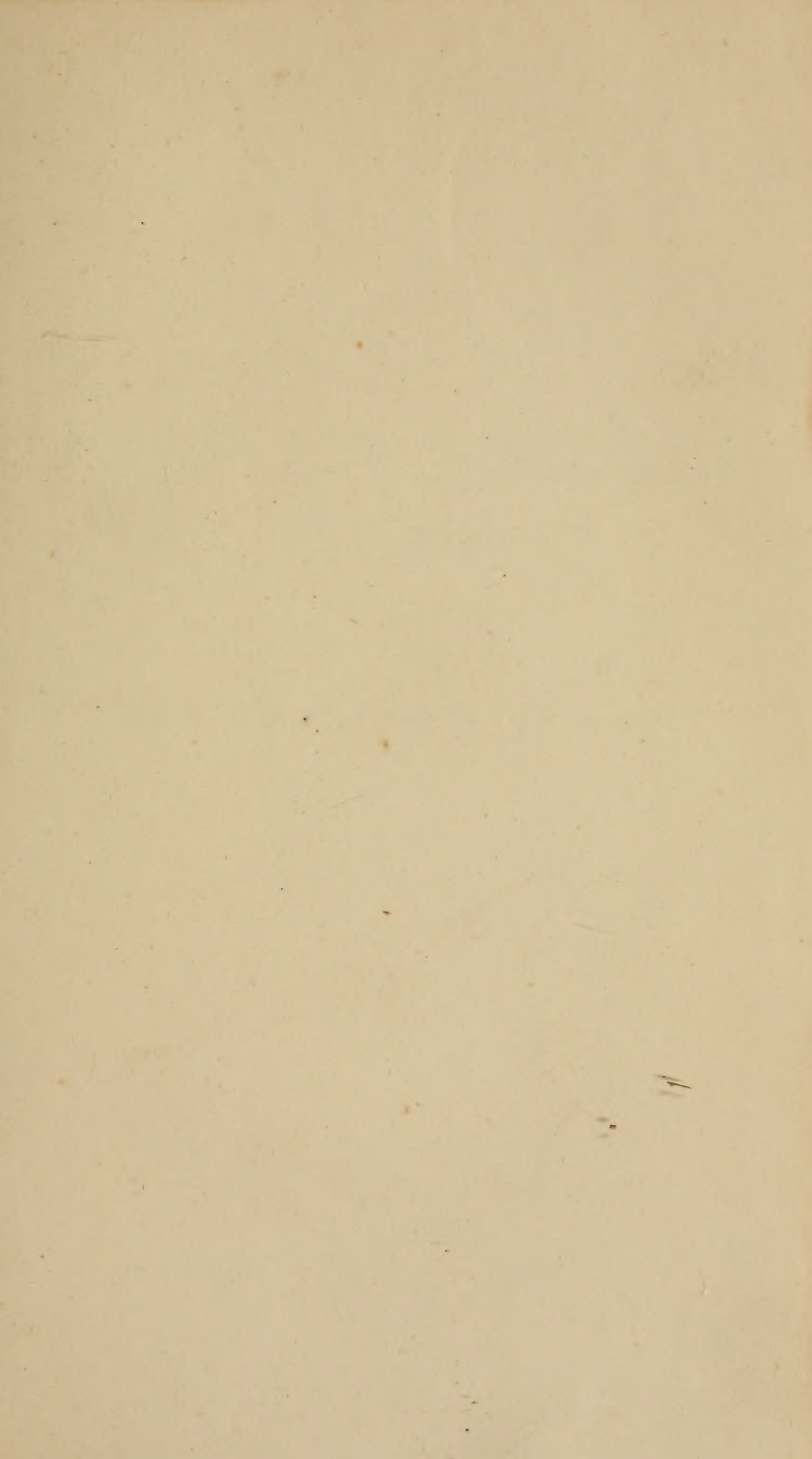
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# INDEX-DIGEST

OF THE

## OREGON AND WASHINGTON REPORTS

INCLUDING VOLUMES 1 TO 14 OREGON, AND 1 AND 2 WASHINGTON.

By CHARLES H. CAREY, LL. B.

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## PREFACE.

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THIS work has been prepared while I have been engaged in active practice at the bar, and although the task has been somewhat arduous, it has not been devoid of interest and profit. If it now proves an aid to others, I will be doubly repaid. Where there are so few reported decisions as in Oregon and Washington Territory, the bench and bar are more or less familiar with them. The chief use, therefore, of such a work is to afford ready means of turning to a case wanted. The utility of a digest which will present a broader statement of the propositions of law adjudicated than can be done in a mere index is, on the other hand, scarcely less apparent. I have therefore adopted a plan not materially differing from the index-digest system which has become so popular of late years, and hope by this method to combine the advantages of both index and digest.

No extended explanation is necessary. It should be said, however, that I have not confined myself to a consideration of the points suggested by the *syllabi* of the cases, and have, indeed, frequently had occasion to note points decided that are not referred to by the reporter, as well as in some few instances to correct manifest errors. The reference to book and page is always to the first page of the case as reported, whether the point referred to is to be found in the *syllabus* or only upon a careful reading of the body of the opinion. When two or more propositions are given as decided in the same case, the

number of the book and page is given with the first stated, and the subsequent propositions refer to the case by the use of the abbreviation "Id." I have added also a list of citations, and a table of cases arranged alphabetically.

This work is not put forth with confidence that it is perfect, but it is believed that, though errors may be discovered on putting it to the test of practical use, the need for such a book warrants its publication, and it is hoped that its imperfections may be forgiven if it be found useful and convenient.

CHARLES H. CAREY.

# DIGEST

OF THE

## OREGON AND WASHINGTON REPORTS.

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**Abandonment.** See Appeals and Errors; Dedication; Eminent Domain; Mines and Mining; Public Lands; Water and Watercourses.

**Abatement.** See Nuisances.

Pleading to the merits waives matter in abatement: Winter and Lattimer v. Norton, 1 Or. 42.

Answer in abatement should be pleaded separately, and disposed of before answer to merits: Hopwood v. Patterson, 2 Or. 49.

Plea of pendency of former suit for same cause of action should show it is still pending: Id.

Denial of corporate existence, and matter in bar, cannot be pleaded and tried together: Oregon Central R. R. Co. v. Wait, 3 Or. 91; Oregon Central R. R. Co. v. Scoggin, 3 Or. 161; Oregon Cascade R. R. Co. v. Baily, 3 Or. 164.

Denial of corporate existence stricken out when pleaded with matter in bar: Oregon Central R. R. Co. v. Scoggin, 3 Or. 161.

Matter in abatement and bar, being pleaded in same answer, leave to amend as to the matter in abatement should be denied: Id.

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Defense that the plaintiff has sold and does not own the account sued on, is not available, unless pleaded in abatement: *Derkeny v. Belfils*, 4 Or. 258.

Abatement of appeal in criminal case by death of defendant leaves judgment for costs in force: *Whitley v. Murphy*, 5 Or. 328.

Executrix substituted on motion as party plaintiff, objection to her qualification, unless taken by abatement, is waived: *Murray v. Murray*, 6 Or. 26.

Pendency of suit in equity on same controversy is not usually ground to abate action at law: *Farris v. Hayes*, 9 Or. 81.

**Abortion.**

Instructions held sufficient in manslaughter by attempted abortion: *State v. Glass*, 5 Or. 73

**Absconding Debtor.**

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**Accessaries.**

When one strikes the fatal blow, and the other is present and assisting, both are principals: *State v. Fitzhugh*, 2 Or. 227.

Acts of each person involved in a criminal enterprise render all responsible for the results: *State v. Johnson*, 7 Or. 210.

Testimony of accomplice alone is not sufficient to warrant conviction: *State v. Odell*, 8 Or. 30.

Proof that prisoner was in the same town at the time is not alone sufficient corroboration: *Id.*

One present aiding and abetting may be convicted on an indictment charging him directly with the commission of the act: *State v. Kirk*, 10 Or. 505.

An accessory before the fact is not a competent witness on behalf of the prisoner: *Edwards v. Territory*, 1 W. T. 195.

The statutes of 1862-63 do not alter the rule of the common law in this respect: *Id.*

**Accession.** See Water and Watercourses.

**Accomplices.** See Accessories.

**Accord and Satisfaction.** See Compromise; Settlement.

**Account-books.** See Evidence.

**Accident.** See Mistake and Accident.

**Accounting.**

When partners are entitled to, and what complaint must show: *Pool v. Buffum*, 3 Or. 440.

Referee for an accounting between partners should ascertain what the profits were; not what they should have been: *Boire v. McGinn*, 8 Or. 466.

Dissolution partly consummated, equity will take jurisdiction for an accounting, and ascertain amounts due on final settlement: *Gleason v. Van Aernam*, 9 Or. 343.

An agreement entered into between the partners on such partial dissolution will be recognized and enforced in the suit in equity for an accounting: *Id.*

Suit for, against former commissioners of school lands, may be maintained in the name of the state: *State v. Chadwick and Brown*, 10 Or. 423.

In such suit allegations in the answer that the funds were expended in payment of just and legal claims against the state are mere conclusions of law, and tender no issue of fact: *Id.*

Right of a joint owner to an accounting of the earnings of a ferry: *Hackett v. Multnomah County*, 12 Or. 124.

In a suit by an assignor against an assignee for the benefit of creditors, for an accounting, when parties can recover costs and attorneys' fees: *Kinney v. Heatley*, 13 Or. 35.

In a suit between partners for an accounting, they are usually severally, but not jointly, liable: *Bloomfield v. Buchanan*, 14 Or. 181.

But where there is a concerted action by some of the partners to exclude one from the profits, they are jointly and severally liable: *Id.*

**Accounts.** See Partnership.

If an account furnished on demand for items under the statute is insufficient, the remedy is by motion to make the same more definite and certain: *Flanders v. Ish*, 2 Or. 320.

No interest allowed on mutual accounts until after settlement and balance struck: *Catlin v. Knott*, 2 Or. 321.

**Accounts (continued).**

Claims against the state, allowed by the secretary of state, do not thereby become accounts stated, and may be shown in collateral attack to be illegal claims: *State v. Brown*, 10 Or. 215.

What is an open mutual account within the subdivision 3, section 539, Civil Code (sec. 549, Hill's A. L.), relating to costs: *Hayden v. Waymire*, 10 Or. 367.

Proper verification of an itemized account sued on, furnished on demand: *Robbins v. Benson*, 11 Or. 514.

Objection to the verification if not made promptly is waived: *Id.*

Account stated is *prima facie* a settlement of all demands, but not conclusive, and does not bar recovery of debt existing at the time and not included: *Normandin v. Gratton*, 12 Or. 505.

Evidence is admissible in an action on an account stated to show that certain matters were not included: *Id.*

False and fraudulent representations accompanying rendering of an account afford ground for disputing account stated: *Kinney v. Heatley*, 13 Or. 35.

A letter containing an account rendered, and not objected to within a reasonable time, is evidence of the facts contained: *Smith v. Kennedy*, 1 W. T. 55.

The failure to object to an account stated, within reasonable time, creates presumption of correctness, and shifts burden of proof: *Baxter v. Waite*, 2 W. T. 228.

The statement of the account, not by agreement, but by silence, creates not a new contract by estoppel, but establishes *prima facie* the correctness of the items: *Id.*

Error to instruct that, after an account is stated, a party not objecting within reasonable time is bound thereby, unless he establish errors and a want of knowledge on his part of the existence of the errors at the time of the rendering of the account to him: *Id.*

Error to instruct that the defendant would not be liable on items in which he discovered errors or mistakes up to the time of commencement of suit: *Id.*

Such instruction precludes defendant from taking advantage of errors ascertained after commencement of the suit up to the time of trial: *Id.*



**Accounts (continued).**

To create an account stated by way of estoppel, what knowledge is necessary: *Id.*

Interest is not recoverable on an open account unless stipulated for: *Id.*

Pleadings admitting a portion of an open account sued on, the plaintiff is entitled to interest on the part admitted, from the time of the commencement of the action: *Bremer v. Burgess*, 2 W. T. 290.

**Acknowledgments.**

Of deeds out of the state, statute must be strictly complied with: *Knighton v. Smith*, 1 Or. 276.

A deed is good between the parties, unacknowledged: *Moore v. Thomas*, 1 Or. 201; *Mann v. Young*, 1 W. T. 454.

Without acknowledgment, a married woman does not relinquish dower by signing husband's deed: *Mann v. Young*, 1 W. T. 454.

Recorded unacknowledged mortgage is no notice to subsequent mortgage: *Id.*

Acknowledgment of *feme covert*, not showing separate examination, a parol showing cannot be made: *Harty v. Ladd*, 3 Or. 353.

Parol evidence not admissible to impeach certificate regular on its face, unless there are allegations in the pleadings to warrant it: *Dolph v. Barney*, 5 Or. 192; *Moore v. Fuller*, 6 Or. 272.

Acknowledgment taken by a deputy clerk without naming his principal, good under territorial law of 1856 by which deputy is an independent officer: *Willamette County v. Gordon*, 6 Or. 175.

Deeds and powers of attorney, not acknowledged, but duly executed in 1845 and 1846, may be proved under sections 17 and 18, page 517, General Laws (secs. 3018, 3019, Hill's A. L.) to entitle them to record: *Wilson v. McEwan*, 7 Or. 87.

Deed not entitled to record, but recorded, is not entitled to priority over mortgage acknowledged and entitled to record, and executed and recorded at same time as the deed: *Fleschner v. Sumpter*, 12 Or. 161.

Certificate in proof of unacknowledged deed must show the witnesses were sworn, and must state that fact: *McIntyre v. Kamm*, 12 Or. 253.

**Acknowledgments** (continued).

Unacknowledged deed conveys title, and is good as against every one but a *bona fide* purchaser for a valuable consideration: *Manandas v. Mann*, 14 Or. 450; *Mann v. Young*, 1 W. T. 454.

Such deed, to be followed by evidence of notice, is admissible as evidence against one who has a subsequent deed duly recorded: *Mann v. Young*, 1 W. T. 454.

Statute of 1867 curing defectively acknowledged deeds is constitutional, and applicable to case of married women: *Skellinger v. Smith*, 1 W. T. 369.

The authority of a notary public to take the acknowledgment of a deed cannot be questioned collaterally: *Bulene v. Garrison*, 1 W. T. 587.

Validity of a deed acknowledged before a county auditor in 1867, not authenticated by his seal, is not decided; but if defective, it was cured by Curative Act, p. 481, Laws of 1873: *Kenyon v. Knipe*, 2 W. T. 422.

**Actions and Suits.** See Accounting; Assumpsit; Bills and Notes; Contracts; Corporations; District Attorney; Fraud and Deceit; Foreible Entry and Detainer; Judgment; Landlord and Tenant; Liens; Malicious Prosecution; Parties; Pleading; Practice; Replevin; Quo Warranto; Slander and Libel; Statute of Limitations.

No action lies to recover back money paid under mistake of law without fraud: *Johnson v. McGinness*, 1 Or. 292.

Amendment of section 93 (sec. 95, Hill's A. L.) of the Code relating to distinction in practice in equity or law cases does not affect pending cases: *Newsom v. Greenwood*, 4 Or. 119.

Proceeding by indictment is an "action at law" within the section of the gambling law of 1876 (Hill's A. L., c. 45), providing for the recovery of fines and forfeitures: *State v. Carr*, 6 Or. 133.

Suit is deemed pending until an appeal is perfected or the period for taking appeal has expired: 6 Or. 166; *Garrison v. Cheeney*, 1 W. T. 489.

Suit cannot be brought in the name of the state to try private controversy: *Wilson and Wakeman v. Shively*, 10 Or. 267.

**Actions and Suits** (continued).

State has power to bring suit in its name for an accounting against persons having charge of school funds: *State v. Chadwick and Brown*, 10 Or. 423.

Essential distinctions between actions and suits are not abrogated by the Code: *Knowles v. Herbert*, 11 Or. 54; *S. C.*, 11 Or. 240; *Beacannon v. Liebe*, 11 Or. 443; *Burrage v. B. G. & Q. M. Co.*, 12 Or. 169.

Proceedings supplemental to execution are proceedings at law: *Burrage v. B. G. & Q. M. Co.*, 12 Or. 169; *Williams v. Gallick*, 11 Or. 337; *contra*, *Murne v. Schwabacher Bros. & Co.*, 2 W. T. 130.

When the mode of proceeding is not pointed out by the Code, the Circuit Court has jurisdiction to enforce a right, and a remedy may be adopted conformable to the spirit of the Code: *Aiken v. Aiken*, 12 Or. 203.

Statute giving cumulative damages to party aggrieved is remedial, and not criminal, and the action is a civil action: *O'Keefe v. Weber*, 14 Or. 55.

Proceedings had in a suit in accordance with the law in effect at the time are valid, and amendment to the law operates only upon subsequent proceedings: *Marks & Co. v. Crow*, 14 Or. 382.

An act of the legislative assembly destroying distinctions between law and equity, and establishing single form of action to establish and enforce private rights, is in violation of the Organic Act: *Stevens v. Baker*, 1 W. T. 315.

Organic act contemplates distinction between courts of law, chancery, and admiralty, and their procedure: *Id.*

In the absence of local equity system, the rules adopted by the Supreme Court of the United States are binding: *Id.*

"Civil actions" under Code of 1869, included action at law and suits in equity: *Garrison v. Cheeney*, 1 W. T. 489.

Pleadings and proceedings in both classes of cases were to be governed by the provisions of that act: *Id.*

By the Amended Code of 1871, the distinction between law and equity was affirmed: *Id.*

Actions at law were thereafter to be governed by the Code, and equity cases by the laws of the United States and the rules of the Supreme Court thereof: *Id.*

**Actions and Suits** (continued).

An action for divorce is a proceeding at law: *Tierney v. Tierney*, 1 W. T. 568.

It is against public policy for persons to occupy the attention of the courts with pretended litigation, in which there are no questions to be judicially determined: *Connolly v. Cunningham*, 2 W. T. 242.

**Administration.** See Administrators and Executors; Legacies; Heirs; Wills.

A law passed after the death of an intestate, but before distribution of his estate, controls such distribution: *Armstrong v. Armstrong*, 1 Or. 207.

Claims presented must be verified by the claimant, and not by his agent: *Zachary v. Chambers*, 1 Or. 321.

Where there is no legal presentment of claim within the statutory time, it is barred to suit thereon: *Id.*

Administrators, executors, and guardians are the claimants who must present claims due the estate or persons they represent: *Id.*

Sale by executors who are mere naked trustees to sell and convey need not be reported to Probate Court: *Hogan v. Wyman*, 2 Or. 302; *Hogan v. Wyman*, 7 Or. 285.

County Court has no power to determine what persons are entitled to realty and partition the same: *Hanner v. Silver*, 2 Or. 336; *Burnside v. Savier*, 6 Or. 154.

County Court is a court of superior jurisdiction in probate matters: *Russell v. Lewis*, 3 Or. 380; *Tustin v. Gaunt*, 4 Or. 305.

Recitals of jurisdictional facts in orders for sale of property are presumed true, and the burden of proof to the contrary is on attacking party: *Tustin v. Gaunt*, 4 Or. 305.

Mistake in making up the record is presumed rather than that order of sale was made before return day: *Id.*; and see *Walker v. Goldsmith*, 14 Or. 125.

Estate acquired by heirs of settler on donation claim, who dies before completing his four years' residence, and before patent, not subject to administration: *Delay v. Chapman*, 3 Or. 459.

Sale of decedent's real property void where infant heir was not made party, and did not appear by guardian: *Fiske v. Kellogg*, 3 Or. 503.



**Administration** (continued).

Under statute of 1855, heirs are necessary parties to a proceeding to sell a decedent's realty, and court must acquire jurisdiction of the parties: *Id.*

Purchaser at administrator's sale has no right to appeal from order of sale or order of confirmation: *Levy v. Riley*, 4 Or. 392.

Recitals in order of sale may be disputed by parts of judgment roll showing want of jurisdiction: *Gilmore v. Taylor*, 5 Or. 89.

Provision in will directing that wife and minor children have use of realty until disposed of by executor, valid: *Humphrey v. Taylor*, 5 Or. 260.

Order to sell realty, and confirmation unnecessary, where executors are mere naked trustees in whom the legal title is vested: *Brown v. Brown*, 7 Or. 285.

Acts done in administration under a will duly probated, but afterwards held invalid, are binding: *Id.*

After disallowance of a claim, and final settlement of estate without objection, creditor cannot sue next of kin on his claim: *Grange Union v. Burkhart*, 8 Or. 51.

County Court has exclusive jurisdiction over distribution of the personalty: *Winkle v. Winkle*, 8 Or. 193.

An antenuptial contract in regard to the personalty must be presented and given effect by the County Court, and equity cannot afford relief where it is not done: *Id.*

Neglect to appeal from order of distribution concludes the parties, and the order becomes final: *Id.*

Before dower is assigned, widow has no estate in decedent's lands, and no right to the rents: *Leonard v. Grant*, 8 Or. 276.

The rents and profits are to be applied to the payment of the debts against the estate until dower is assigned: *Id.*

A "claim" against an estate is a legal demand for money to be paid out of the estate, and must have been recoverable from deceased if he had lived: *Weill v. Clark's Estate*, 9 Or. 387.

A mere equitable right, not enforceable in a Probate Court, is not a claim: *Id.*

Tender by an heir to pay a claim against the estate will not be ground for refusing an order for sale of real property of the estate to pay such claim: *Id.*



**Administration** (continued).

Whether an order is intended as a final order or not is to be determined by the intention of the court: *Harvey's Heirs v. Wait*, 10 Or. 117.

Petition for sale of realty is jurisdictional, and must strictly comply with the statute: *Wright and Jones v. Edwards*, 10 Or. 298.

Sale is void on collateral attack where jurisdiction does not appear affirmatively from the petition: *Id.*

County Court has exclusive jurisdiction to settle final accounts of administrator: *Adams v. Petrain*, 11 Or. 304.

Action cannot be maintained against administrator on his bond until his accounts have been settled in the County Court: *Id.*; and see *Hamlin v. Kinney*, 2 Or. 91.

County Court has exclusive jurisdiction to grant and revoke letters of administration: *Ramp v. McDaniel*, 12 Or. 108.

Error in appointing creditor administrator before the widow declines to act, when not taken advantage of by applying for appointment within statutory time, is waived: *Id.*

Order appointing or removing administrator cannot be collaterally attacked: *Id.*

Power of County Court to allow administrator to resign is not limited to the mode prescribed by statute: *Id.*

Probate powers of County Court are not created by statute, but are thereby enlarged, limited, or varied: *Id.*

Widow is entitled to dwelling-house for one year, and this right is not affected by section 1094 Civil Code (sec. 1126, *Hill's A. L.*): *Aiken v. Aiken*, 12 Or. 203.

But husband must have been seised of the land, and not have held a mere leasehold interest: *Id.*

Widow cannot obtain possession by ejectment or forcible entry and detainer: *Id.*

Objection to a claim for informality must specify the ground, or the objection is waived: *Aiken v. Coolidge*, 12 Or. 244.

Residue defined; it is ascertained on presentation and allowance of final account, and residuary legatee is then entitled to take: *Leahy v. Cardwell*, 14 Or. 171.

**Administration** (continued).

Such legatee is not chargeable with interest on notes given to executor for funds belonging to the estate after final settlement: *Id.*

The effect of section 371, Civil Code (sec. 375, Hill's A. L.), is to abolish the common-law rule, making one who wrongfully interferes with an estate an executor *de son tort*: *Rutherford v. Thompson*, 14 Or. 236.

But such person is held liable after appointment of administrator by an action at law in the name of the administrator: *Id.*

And in such action such person may show in mitigation of damages that he used the proceeds of the property to pay the debts of the estate: *Id.*

Administrator takes entire charge of the estate, whether it passes to an heir by descent, or otherwise: *Ward v. Moorey*, 1 W. T. 104.

In the absence of statute, surviving partner has absolute control of partnership effects: *Barlow and Shepherd v. Coggan*, 1 W. T. 257.

Remedy cannot be had against executor of deceased partner for partnership debt, unless the partnership property is insufficient to satisfy it: *Id.*

Presentment and demand of a promissory note signed by partners should be made of surviving partner, and not of executor of deceased partner: *Id.*

General provision that claim must, before suit brought, be presented to administrator has no application to such case: *Id.*

Courts do not recognize the personal representative of a deceased person appointed by foreign state: *Id.*

In Washington Territory property vested in a non-resident administrator is liable to attachment and other process: *Id.*

On the decease of an intestate pre-emptor, whose title at time of death was inchoate, a salable possessory right passes to the administrator: *Burch v. McDaniel and Johnson*, 2 W. T. 58.

Administrator of a deceased pre-emptor takes his decedent's possessory right subject to a trust requiring him to complete the title, if of advantage to the heirs, and if he can do so: *Id.*

**Administration (continued).**

For the discharge of this duty, administrator is liable as for the discharge of any other duty: *Id.*

Aside from this trust, administrator is free to dispose of this possessory right for the benefit of the estate: *Id.*

The pre-emption statutes place the one restriction on the administrator, viz., a continuance of the restriction on the pre-emptor against transferring any interest in the land: *Id.*

Sale of personal property of estate, made by executor without order of court, may be ratified by the court if advantageous to the estate: *Brewster v. Baxter*, 2 W. T. 135.

So one interested in the estate may ratify such sale to the extent of his interest: *Id.*

Instruction to the effect that a demanding of an accounting by one interested in the estate, of the proceeds of such invalid sale, with full knowledge of the facts, is a ratification of the sale, is not erroneous: *Id.*

Failure to verify a petition which is the foundation of probate proceedings is but an irregularity, and does not render the proceedings subject to collateral attack: *McCoy v. Ayres*, 2 W. T. 203.

Transcript of record of Probate Court in Oregon, showing that that court had assumed jurisdiction over certain notes, is *prima facie* evidence that they were within the state of Oregon at the time: *Id.*

In an action by administrator against a son of the deceased for misappropriation of part of the estate, a brother of the defendant is a competent witness in his behalf: *McCoy v. Ayres*, 2 W. T. 307.

In such case the brother is not interested adversely to the estate, and does not come within the statute forbidding party in interest to the record from testifying: *Id.*

Action will not lie at common law against one collecting debts due an estate, for the reason that the original debtor remains liable: *Id.*

But in the case of specific chattels taken, the rule is otherwise: *Id.*

Suit in equity can be maintained against a person so collecting, if it be shown that the original debtor is insolvent: *Id.*

**Administration** (continued).

Notes found in the state of Oregon, at the place of death of the deceased, are properly payable in that state, though secured by mortgage in Washington Territory: *Id.*

An accounting for such notes to the Probate Court in Oregon relieves administrator, appointed there, from liability in an action in Washington Territory by administrator appointed there: *Id.*

**Administrators and Executors.** See Administration.

Executor and his sureties are not liable on his bond until default of the executor in Probate Court: *Hamlin v. Kinney*, 2 Or. 91; *Adams v. Petrain*, 11 Or. 304.

Executors of a naked trust to sell and convey need not qualify or make report of sale: *Hogan v. Wyman*, 2 Or. 302.

Possession and control of executor over property is that of an owner for purposes of taxation: *Johnson v. Oregon City*, 2 Or. 327; *Johnson v. City Council of Oregon City*, 3 Or. 13.

Control of administrator over an estate, under section 1088 (sec. 1120, *Hill's A. L.*), is limited by sections 1161 and 1162 of the Code (secs. 1193, 1194, *Hill's A. L.*), providing for proceedings to set aside the share of an heir or other person in an estate: *Hanner v. Silver*, 2 Or. 336.

*Situs* of personalty is with resident rather than with non-resident co-executor: *Johnson v. City Council of Oregon City*, 3 Or. 13.

Administrator has no right or interest in the estate of the heirs of a settler on donation claim, who dies before patent issues: *Delay v. Chapman*, 3 Or. 459.

Administrator has no right to sue to set aside a conveyance made by his decedent fraudulently, without leave of court: *King and Lownsdale v. Boyd*, 4 Or. 326.

Right to real estate limited to purposes of administration: *Id.*; *Humphreys v. Taylor*, 5 Or. 260.

When ordered to file new bond and fails to comply, deemed removed and his authority ceased: *Levy v. Riley*, 4 Or. 392.

Purchaser at sale of such administrator, without knowledge, is entitled to relief in equity: *Id.*



**Administrators and Executors (continued).**

Executor, or his heirs, are not allowed interest on setting aside a conveyance to the executor of land of the estate bought in by him: *Layton v. Hogue*, 5 Or. 93.

Cannot maintain action for the recovery of possession of real property of the estate: *Humphreys v. Taylor*, 5 Or. 260.

On death of plaintiff, if executrix is upon motion substituted as plaintiff in the action, objection to her appointment must be taken by plea in abatement, or is waived: *Murray v. Murray*, 6 Or. 26.

Though such executrix is not regularly appointed, and entitled to sue as such, she is a proper party if she be the legatee to the real property in controversy, and therefore the successor in interest of the plaintiff: *Id.* Administrator's bond failing to express penal sum, mistake not presumed against sureties: *Evarts v. Steger*, 5 Or. 147.

Such bond is void, and cannot be reformed in equity: *Evarts v. Steger*, 6 Or. 55.

Administrator has no authority to partition real estate of partnership: *Burnside v. Savier*, 6 Or. 154.

Where the estate is indebted, the administrator is a trustee for the creditors, and may show that a bill of sale made by his intestate was intended fraudulently as a chattel mortgage: *Bartel v. Lope*, 6 Or. 321.

Where the will directs payment of debts, and the realty is devised to executors as trustees to hold for certain purposes, they have implied power to sell portions to pay the debts: *Brown v. Brown*, 7 Or. 285.

Administrator is entitled to control real estate and use the rents and profits to pay the debts, and widow is not entitled to receive one third of the rents before dower is assigned: *Leonard v. Grant*, 8 Or. 276.

Action against administrator cannot be commenced within six months after letters issued: *Wells v. Applegate*, 10 Or. 519.

Allegation in the complaint that the order of appointment was made on a certain day is not an allegation that letters issued on that day: *Id.*

But after verdict it is presumed that the executors qualified immediately after letters issued: *Aiken v. Coolidge*, 12 Or. 244.



**Administrators and Executors** (continued).

Not liable on bond for delinquencies until their accounts have been settled in County Court, even though removed for misconduct before the estate is fully administered: *Adams v. Petrain*, 11 Or. 304.

Property in the hands of executor before distribution is in custody of the law, and not subject to garnishment: *Harrington v. La Rocque*, 13 Or. 344.

But after distributive share has been ordered paid to devisee, it is subject to garnishment: *Id.*

Assignee of devisee may notify executor of the assignment of such share to him, and so require payment to be made to him: *Id.*

But assignee cannot have a decree of court on distribution ordering such payment to be made to him; and any such decree is void on collateral attack: *Id.*

Administrator takes charge of the entire estate of the decedent, whether it passes to the heir by descent or otherwise: *Ward v. Moorey*, 1 W. T. 104.

**Admiralty.** See Boats and Vessels; Common Carriers; Masters.

No new evidence can be received in admiralty cases by the Supreme Court: *Cutler v. Steamship Columbia*, 1 Or. 101; *Nickels v. Griffin*, 1 W. T. 374; *contra*, *Phelps v. S. S. City of Panama*, 1 W. T. 615.

Collision case between brig and steamer on the Columbia River: *Cutler v. Steamship Columbia*, 1 Or. 101.

Rule in admiralty suits *in rem* and *in personam* as to charging a ship as carrier: *Seller v. Steamship Pacific*, 1 Or. 409.

Power of master to bind owner of vessel: *Gove v. Moses*, 1 W. T. 7.

Material-men have no lien on domestic vessel in home port, or that where the owner resides; though circumstances may qualify the rule: *Price, Green, & Co. v. Lightner*, 1 W. T. 33.

Surrender of possession is a waiver of lien: *Id.*

Statute of California creates no lien until the proceedings are instituted to enforce the liability as therein provided: *Id.*

There being no such lien created in this case, the court, sitting in admiralty, can exercise no jurisdiction: *Id.*

**Admiralty (continued).**

Courts of admiralty proceeding *in rem*, in a proper case, sometimes recognize and enforce maritime claims of an equitable character not actual liens: *Id.*

Claims for brokerage, factorage, etc., held a charge for which the ship was liable, to be paid out of funds in the court: *Id.*

Vessels navigating Puget Sound, as those on the sea, must observe the rules established by the board of inspection of the United States: *Meigs and Talbot v. Steamship Northerner*, 1 W. T. 78.

Failure of vessel to exhibit lights does not excuse another from faults contributing to a collision: *Id.*

Vessel without lights is in fault, unless she govern herself by the lights of approaching steamer: *Id.*

When collision is the result of mutual faults, damages and costs should be equally apportioned: *Id.*; *Puget Sound C. Co. v. Taylor*, 2 W. T. 93.

Omission to decree costs in admiralty case does not prevent the decree from being final: *Sloop Leonede v. United States*, 1 W. T. 153.

Costs rest largely in the discretion of an admiralty court, and omission in decree is presumptive that court did not intend to decree costs: *Id.*

Mode of appeal in admiralty in Washington Territory is the same as from District to Circuit Court of United States: *Id.*

Manner of appeal and review in admiralty cases specifically pointed out and distinguished: *Id.*

Supreme Court of the territory has made no rules governing appeal in admiralty cases; as to whether it has power to do so, *quære*: *Nickels v. Griffin*, 1 W. T. 374.

Supreme Court of the United States has made no rules governing the territorial court in such appeals: *Id.*

Neither Congress nor the territorial legislature have attempted to regulate admiralty practice in the District Courts of the territory: *Id.*

District Courts of the territory are free to adopt the admiralty rules of the United States District Court: *Id.*

In the absence of rules or law of Congress regulating appeals in admiralty cases to the Supreme Court of the territory, the statutes of the territory prevail: *Id.*

**Admiralty (continued).**

- Admiralty cases must come to the Supreme Court by appeal: *Id.*
- The simple relation of master and servant does not express the more complex relation of shipmaster and crew: *Id.*
- Such relation has been likened to that of parent and child, teacher and pupil, and head of a family to his domestic servants: *Id.*
- The trust of the master is the care of his vessel, cargo, crew, passengers, and the promotion and transaction of his vessel's business: *Id.*
- The maintaining of good order on his vessel is one of the duties of a master: *Id.*
- There is an implied contract in shipping articles of obedience on the part of the sailor and protection on the part of the master: *Id.*
- As against himself, a master is conclusively presumed competent to discharge his duties: *Id.*
- Where a master permits his mate, without sufficient cause, to inflict personal injuries on a seaman, he is liable as though personally guilty: *Id.*
- The lower court properly refused to admit certain exculpatory evidence on the part of the master: *Id.*
- Admiralty jurisdiction is vested in District Court of Washington Territory: *Phelps v. S. S. City of Panama*, 1 W. T. 518.
- Before the adoption of the federal constitution, admiralty law was local and territorial, but became part of the laws of the United States, with its procedure, by the adoption of the constitution: *Id.*
- Law maritime and admiralty was in the territory as part of the local law before the territory was erected, and was then to be classed among the laws of the territory, as referred to in the Organic Act: *Id.*
- Law admiralty, as a federal law, displaced the territorial admiralty law by virtue of act of Congress extending to the territory the laws of the United States not inapplicable: *Id.*
- Name of libellant, unnecessarily inserted in libel, should be stricken out if motion is made at proper stage; otherwise, will not be noticed: *Id.*

**Admiralty (continued).**

Suit is properly brought *in rem* for personal injuries occasioned to passenger by negligence in violation of duty as carriers: Id.

The circumstance that the subject of transportation is a person instead of merchandise should not alter the rule: Id.

No right of trial by jury in such case: Id.

To warrant reversal on the facts, there should be such preponderance as would warrant setting aside verdict of a jury: Id.

A deposition to be used in an admiralty case may properly be taken before a notary public: *Phelps v. S. S. City of Panama*, 1 W. T. 615.

Practice in taking depositions in admiralty cases is governed by the rules of the United States courts and statutes of the United States, and with the statutes there must be strict compliance: Id.

Opening a deposition by the clerk, and placing same on file without order of the court, in such case, precludes its being received in evidence: Id.

Appeals from District to Supreme Court in admiralty must be taken in accordance with the civil law: *Steamer Zephyr v. Brown*, 2 W. T. 44.

Allowance of such appeal is necessary by the lower court to give the appellate court jurisdiction: Id.

In the absence of rule or statute, such appeal must be taken during a sitting of the court, or at the time of sentence: Id.

And must be taken to the next succeeding term of the appellate court: Id.

No written petition for appeal or for apostles is necessary when, at time of sentence, the court allows time for appeal: *Waddell and Miles v. Steamer Daisy*, 2 W. T. 76.

The action of the court, in such case, in granting time for the appeal, was sufficient letters dismissory of the cause: Id.

Practice has made the filing of an appellatory libel, as known to the civil law, unnecessary: Id.

No monition issuing out of the Supreme Court to the trial court to transmit the cause is necessary, especially



**Admiralty** (continued).

where there is no unwillingness on the part of the judge of the lower court: *Id.*

Steamer not liable to owner of material used in building machinery furnished her, where such owner furnished the same to one who had a contract to build the machinery, and owners and agents of vessel did not authorize using said material: *Id.*

Test, whether contract for furnishing materials is a maritime contract, is whether vessel is so far finished at the time that anything further done on her would, in its nature, be maritime: *Id.*

Libel averring the material was used in building the vessel demonstrates that the contract was non-maritime, and court has no jurisdiction *in rem*: *Id.*

Doubt expressed, of power of legislature to confer on courts power to entertain suits *in rem* in admiralty for materials furnished in building a vessel: *Id.*

Section 823, Revised Statutes, and those following it, determine the tariff of fees for clerks of territorial courts in admiralty cases: *Id.*

Under admiralty rule 16, suit *in rem* against vessel for assault upon seamen by officers is precluded: *Smith v. Ship Challenger*, 2 W. T. 447.

The remedy is by action *in personam*: *Id.*

**Adverse Possession.** See Dedication; Possession; Statute of Limitations.

Quiet and exclusive possession is evidence of title until a better is shown: *Oregon Cascade R. R. Co. v. Oregon Steam Nav. Co.*, 3 Or. 178.

Purchaser of several town lots and blocks residing on one block, his occupancy is not adverse as to the other lots or blocks, unoccupied and unimproved, against one having prior title: *Wilson v. McEwan*, 7 Or. 87.

Person in adverse possession erecting a wooden building on blocks or posts cannot remove it when ousted by the rightful owner: *Doscher v. Blackiston*, 7 Or. 143.

Person entering under color of title is presumed to enter and occupy to the boundaries expressed in the title: *Phillipi v. Thompson*, 8 Or. 428; *Joy v. Stump*, 14 Or. 361.



**Adverse Possession** (continued).

Person claiming by adverse possession may prove color of title under a tax deed, though the description therein is imperfect: *Smith v. Shattuck*, 12 Or. 362.

Adverse possession of real property for the statutory period ripens into a perfect title and becomes a vested right as though evidenced by written title: *Parker v. Metzger*, 12 Or. 407; *Joy v. Stump*, 14 Or. 361.

Grant of easement is presumed from adverse enjoyment for statutory period: *Johnson v. Knott*, 13 Or. 308.

Payment of taxes by the owner of the soil is not inconsistent with acquisition of such right: *Id.*

Must be an occupancy under claim of ownership, though it need not be under color of title: *Swift v. Mulkey*, 14 Or. 59.

Deed of quitclaim or other instrument that purports to convey title is sufficient to constitute color of title: *Id.*

Where title to land is in an infant, his mother residing on the land as a family residence, collecting rents in his name, and listing the property for taxation in his name, cannot acquire title by adverse possession: *Lawrence v. Lawrence*, 14 Or. 77.

The possession must be hostile; husband and wife cannot occupy jointly, adverse to each other: *Springer v. Young*, 14 Or. 280.

There must be a disseisin, which must be an actual expulsion for the full statutory period: *Id.*

Adverse possession for statutory period confers such title as will support an action in ejectment: *Joy v. Stump*, 14 Or. 361.

Possession as foundation of adverse claim must be actual occupancy, and will not be extended by construction beyond actual limits of the occupation: *Id.*

Possession of donation claim by a party claiming under a quitclaim deed, executed before completion of residence and cultivation for four years, is possession under contract prohibited by law, and gives no color of title: *Bullene v. Garrison*, 1 W. T. 587.

Such possession cannot be adverse, so as to entitle possessor to benefit of statute of limitations: *Id.*

One buying city lot, according to plat showing a street bounding the lot, cannot, by adverse possession or claim

**Adverse Possession** (continued).

under previous title, acquire a right to the land embraced in such street: *Moore v. City of Walla Walla*, 2 W. T. 184.

**Adultery.** See Divorce.**Affidavits.** See Pleadings; Summons.

Affidavits in support of motion for leave to file answer cannot be heard on appeal from default: *Cain v. Harden*, 1 Or. 360.

Counter-affidavits may be filed on application to set aside decree under section 57 of Code (sec. 58, Hill's A. L.): *Smith v. Smith*, 3 Or. 363.

Affidavit in support of cross-motion for leave to perfect appeal should be filed before motion comes on for hearing: *Cross v. Chichester*, 4 Or. 114.

Of sureties on undertaking on appeal must be filed contemporaneously with undertaking: *Holcomb v. Teal*, 4 Or. 352; *Alberson v. Mahaffey*, 6 Or. 412; *State v. McKinnore*, 8 Or. 207.

Upon affidavit of inability to pay, a party will not be required to pay trial fee: *Bailey v. Frush*, 5 Or. 136.

Affidavit for immediate delivery in replevin no part of the pleadings: *Moser v. Jenkins*, 5 Or. 447.

Affidavits are not admissible to impeach a record showing appearance and answering: *Cauthorn v. King*, 8 Or. 138.

Affidavit for attachment need only state the ultimate facts: *Crawford v. Roberts*, 8 Or. 324.

Counter-affidavit in proceeding for contempt is not a pleading, but is evidence merely, and may be rebutted without replication: *State v. McKinnon*, 8 Or. 487.

Affidavit in support of motion for an order to abate a nuisance is a part of the judgment roll and transcript on appeal from such order: *Ankeny v. Fairview Milling Co.*, 10 Or. 390.

Affidavit for immediate delivery in replevin is jurisdictional to the order: *State v. Bacon*, 13 Or. 144.

Such affidavit, if in Justice's Court, should be indorsed by justice, and not by plaintiff, directing the officer, but if not so done, the error is not fatal: *Id.*

Affidavit for continuance should state the facts on which belief that witness can be had at the next term is founded: *State v. O'Neil*, 13 Or. 183.

**Affidavits (continued).**

Proof of service of personal process by publication may be made by affidavit: *Garrison v. Cheeney*, 1 W. T. 489.

A master in chancery is not authorized to make such oath: *Id.*

Whether absence of venue in an affidavit sworn to before a justice of the peace is fatal, *quære*: *McCoy v. Ayres*, 2 W. T. 203.

**Admissions.** See Evidence; Pleadings; Summons.

**Agency.** See Admiralty; Common Carriers.

Principal must adopt or reject acts of agent as an entirety: *Coleman v. Stark*, 1 Or. 115.

Deputy or agent must transact business in name of principal: *Dennison v. Story*, 1 Or. 272.

Wife is deemed agent of her husband in receiving money from sale of her separate property under foreclosure of his mortgage thereon, and though she had notice of the same, she is not estopped: *Fahie v. Pressey*, 2 Or. 23.

Not sufficient to declare in a deed that it is executed for and in behalf of principal; it must be executed in the name of the principal: *Eagle Woolen Mills Co. v. Monteith*, 2 Or. 277.

Principal liable for injury by firing gun by agent, though done not as directed: *Oliver v. N. P. T. Co.*, 3 Or. 84.

Agent alone liable where he abandons his principal's business entirely; but not when he does the business, though not in accordance with his orders: *Id.*

Agent liable on contract unless plaintiff had notice of agency; burden is on agent to show that plaintiff had such notice: *McCall v. Elliott*, 3 Or. 138.

Agent in possession of land for principal has not such possession as to be liable for rent under statute: *Stewart v. Perkins*, 3 Or. 508.

Minor son as agent for parent in contracting debts: *Carney v. Barrett*, 4 Or. 171.

Agent of railroad company, charged with the duty of locating the line of the road, cannot, for consideration moving to himself, agree on selecting particular route, regardless of the interest of his principal: *Holladay v. Davis*, 5 Or. 40.

Corporations are bound by the simple contracts and acts of agents in their ordinary duties: *Fink v. Canyon Road Co.*, 5 Or. 301.

**Agency (continued).**

President of railroad, authorized generally as financial agent, has no power to execute chattel mortgage on a locomotive under corporate seal: *Luse v. Isthmus Transit R'y Co.*, 6 Or. 125.

Agent may testify in what capacity and for whom he was acting, whether as agent for one or another: *Bennett v. N. P. Ex. Co.*, 12 Or. 49.

Person signing his name to note, adding simply "Pres.," or "Sec.," is personally bound: *Guthrie v. Imbrie*, 12 Or. 182.

But where president and secretary of a corporation so sign and affix the seal bearing the company name, it is presumed the intention is to bind the corporation: *Id.*

Between the parties to the note, where there is uncertainty on its face, *semble*, that parol evidence is admissible to fix liability of principal: *Id.*

Agent buying land from distant principal, without disclosing better offer previously received, takes advantage of his relation, and the deed will be set aside on repayment of price: *Savage v. Savage*, 12 Or. 459.

Agent taking mortgage in his own name binds principal by his default in a suit to foreclose a prior lien, although subsequently he assigns the mortgage to his principal: *Watson v. Dundee M. & T. I. Co.*, 12 Or. 474.

Existence of agent's authority is a question of fact; what he may do by virtue thereof is a question of law: *Glenn v. Savage*, 14 Or. 567.

The question whether an agent is duly authorized is not a question for the jury: *Id.*

Master cannot act as agent of shipper and owner of vessel at same time: *Gove v. Moses*, 1 W. T. 7.

But may act as agent of shipper after his duty as master ceases: *Id.*

Wharfinger to whom ship delivers goods, with instructions not to pass them to consignee till the payment of freightage, is agent of the ship: *Williams v. Steamship Columbia*, 1 W. T. 95.

Agent selling logs for principal, permitting purchasers to scale them, instead of employing official scaler, is guilty of negligence, and liable to principal for loss by incorrect measurement: *Crawford v. Cockran*, 2 W. T. 117.



**Agency (continued).**

Principal knowing of supplemental proceedings against agent, wherein goods of principal are sought to be held for agent's debt, must intervene, or he cannot complain if loss ensue: *Murne v. Schwabacher Bros. & Co.*, 2 W. T. 192.

**Aliens.** See Indians; Public Lands; Treaties.

**Alimony.** See Divorce.

**Alteration of Instruments.** See Bills and Notes; Erasures.

Adding the words "in gold coin" to note is material alteration: *Wills v. Wilson*, 3 Or. 308.

When makers liable on joint note so altered; notice; ratification: *Id.*

Alteration of note by stranger, with intent to cancel the note, raises no presumption of payment: *Whitlock v. Manciet and Bigne*, 10 Or. 166.

Alteration of instrument under seal after delivery has been consummated avoids the instrument: *Walla Walla Co. v. Ping*, 1 W. T. 339.

Where a penal sum is not in bond when signed by sureties, and is subsequently and after the bond passes from their control inserted, they are not liable: *Id.*

They are not estopped from denying their liability, although the bond has been accepted without knowledge of the alteration: *Id.*

Alterations in deed after signed and sealed, and after it passes from control of maker, render the deed void, unless maker afterward in due form assents: *Id.*

Alterations after signing, but before leaving control of grantor, do not render the deed void, the maker being estopped: *Id.*

Authorities, to the effect that alterations in a sealed instrument may be authorized by parol to be altered, reviewed, and shown to be a departure from the ancient and generally accepted rule of law: *Id.*

**Amendments.** See Judgments; Pleadings; Records; Summons.

**Animals.** See Estrays; Common Carriers; Fences; Lost Property; Trespass.

Owner of domestic animal not liable for injury resulting from its vicious disposition unless he is chargeable with notice of its disposition: *Dufer v. Cully*, 3 Or. 377.



**Animals (continued).**

Rule does not apply, however, in case of trespass *quare clausum fregit*: *Id.*

Taking cattle from the range, branding them, and returning them, apparently in good faith, believing them without owner, raises no presumption of criminal intent: *State v. Swayze*, 11 Or. 357.

Natural marks on cattle, though serving to identify them, are not marks of ownership: *Id.*

**Answers and Defenses.** See Pleadings; Recoupment; Set-offs and Counterclaims.

1. DENIALS.

2. IN GENERAL.

3. IN PARTICULAR CASES.

1. DENIALS.

Specific denial of all allegations in a complaint denies right of action: *Bailey v. Warren*, 1 Or. 357.

What is sufficient denial of information and belief: *Robbins v. Baker*, 2 Or. 52; *Sherman v. Osborn*, 8 Or. 66; *Wilson v. Allen and Lewis*, 11 Or. 154.

When denial of corporate existence is abatement, and when bar: *Oregon Central R. R. Co. v. Wait*, 3 Or. 91; *Oregon Central R. R. Co. v. Scoggin*, 3 Or. 161.

Denial that plaintiff corporation is duly organized raises no issue: *Oregon Central R. R. Co. v. Scoggin*, 3 Or. 161.

Denial that property is of the exact value alleged is an admission of any less value: *Scovill v. Barney*, 4 Or. 288.

Conjunctive allegation must be denied disjunctively: *Id.* Allegation that D. made, executed, and delivered note, not put in issue by denying that he delivered it: *Cogswell v. Hayden*, 5 Or. 22.

Denial that it was transferred "for value received," and denial of indebtedness, raise no issue: *Id.*

No issues can be raised by conjunctive and literal denials: *Moser v. Jenkins*, 5 Or. 447; *City of Seattle v. Buzby*, 2 W. T. 25.

Denial of work performed, in an answer pleading a special defense which admits it was done, raises no issue: *Lung Louis & Co. v. Brown*, 7 Or. 326.

A denial of knowledge where information can be had by inspection of records is sham: *Wilson v. Allen and Lewis*, 11 Or. 154.

**Answers and Defenses** (continued).

Denial of reasonableness of attorney's fee, alleged in action on a note, raises an issue to be tried: *Bowles v. Doble*, 11 Or. 474.

Denial in manner and form admits the allegation: *City of Seattle v. Buzby*, 2 W. T. 25.

Allegation that "each and every of four separate causes of action set forth in the complaint did not accrue within six years," contains a negative pregnant, and need not be denied: *Gammon v. Dyke*, 2 W. T. 266.

**2. IN GENERAL.**

In an answer in confession and avoidance, new matter must be so stated as to amount to complete bar: *Goodwin v. Barnhart*, 1 Or. 215.

In abatement must be pleaded separately, and disposed of before answer to merits: *Hopwood v. Patterson*, 2 Or. 49.

Defense of pendency of former suit for same cause must show suit still pending: *Id.*

A supplemental answer in the nature of a plea *puis darrein continuance* does not waive former pleas, usually: *Hamlin v. Chapman*, 2 Or. 91.

Amendment of Code, allowing equitable defenses in actions at law, is a radical change: *Delay v. Chapman*, 2 Or. 242.

Pleading former suit as a bar must show facts as to what matter was therein determined: *Heatherly v. Hadley*, 2 Or. 269.

Evidence must not be set up in or made part of answer: *White v. Allen*, 3 Or. 103.

Essential to equitable defense that defendant has no legal defense: *Id.*

Abatement pleaded with matter in bar will be stricken out on motion: *Oregon Central R. R. Co. v. Scoggin*, 3 Or. 161.

Not all facts constituting defense will afford equitable affirmative relief: *Kennard v. Sax*, 3 Or. 263.

Answer must not be contradictory; admissions in such answer are binding: *Foren v. Dealey*, 4 Or. 92.

Answer which puts in issue the ultimate facts is sufficient: *Id.*

Must be false and pleaded in bad faith to be stricken out as sham: *Id.*

**Answers and Defenses** (continued).

Defense that plaintiff is not the real party in interest must be pleaded in abatement, and otherwise cannot be taken advantage of after going to trial on the merits: *Derkeny v. Belfils*, 4 Or. 258.

When an answer in an action at law sets up a complete legal defense, a cross-bill in equity cannot be filed under section 377 of the Code (sec. 381, Hill's A. L.): *Dolph v. Barney*, 5 Or. 193; *Scheland v. Erpelding*, 6 Or. 258.

Doctrine of parol demurrer is not recognized in Oregon: *English v. Savage*, 5 Or. 518.

Where a defendant has no plain, adequate, and complete remedy at law, an equitable defense may be pleaded by cross-bill, although the facts so pleaded constitute but a partial defense to the action at law: *Hatcher v. Briggs*, 6 Or. 31.

Failure to plead equitable defense by cross-bill does not preclude filing original bill: *Hill v. Cooper*, 6 Or. 181.

Estoppel, as a defense, must be pleaded to be available: *Rugh v. Ottenheimer*, 6 Or. 231.

Manner of pleading estoppel as a defense: *Page v. Smith*, 13 Or. 410.

Irregularity in counterclaim not demurred to, unless jurisdictional, is waived by reply: *Scheland v. Erpelding*, 6 Or. 258.

Inconsistent defenses may be pleaded in same answer in real actions: *Moore v. Willamette T. & L. Co.*, 7 Or. 355.

Pleading which is but a repetition of former one adjudged insufficient is frivolous: *Farris v. Hayes*, 9 Or. 81.

Informal statement of facts in answer cured by verdict: *Houghton and Palmer v. Beck*, 9 Or. 325; *Andros v. Childers*, 14 Or. 447.

Where one pleads jointly with other defendants facts constituting defense for himself alone, objection must be made before trial that he should have answered separately: *Brown & Co. v. Rathburn*, 10 Or. 158.

Matter not constituting complete defense may be pleaded in mitigation of damages, but must be pleaded as a partial defense: *Webb v. Nickerson*, 11 Or. 382.

On filing an amended answer, a former one and all motions and demurrers relating thereto are abandoned,

**Answers and Defenses** (continued).

and cease to be a part of the record reviewable on appeal: *Wells v. Applegate*, 12 Or. 208.

Answer must set forth defense with the same precision and accuracy required in a complaint: *Meeker v. Wren*, 1 W. T. 73.

Matters of defense must be stated with particularity and definiteness: *Roeder, Peabody, & Co. v. Brown*, 1 W. T. 112.

Answer admitting allegations of complaint with qualifications, the plaintiff is not relieved from proving the allegations qualified by the answer: *Breemer v. Burgess*, 2 W. T. 290.

Affirmative matter in answer which in effect amounts to but a denial of complaint, adds nothing to the issue made by the denials: *P. S. I. Co. v. Worthington*, 2 W. T. 482.

Defendant denying contract alleged, it is irrelevant to set forth the contract he claims he did make: *Id.*

**3. IN PARTICULAR CASES.**

Defense of the statute of limitations must be set up as new matter, unless the fact appears on the face of the complaint: *Steamer Senorita v. Simonds*, 1 Or. 274.

Answer held not sufficient in an action on forthcoming bond: *Norton v. Winter*, 1 Or. 97.

Answer that the suit did not accrue within six years is sufficient on demurrer where the period of statutory limitation is five years: *Baldro v. Tolmie*, 1 Or. 176.

Answer to petition for *mandamus* may not raise issues of ultimate right to office: *Warner v. Myers*, 3 Or. 218.

Coverture, in suit against wife alone, when bar and when abatement: *Kennard v. Sax*, 3 Or. 263.

In action of ejectment, defendant claiming undivided interest must specify what interest he claims: *Pease v. Hannah*, 3 Or. 301.

In action on general warranty in deed, defendant cannot set up that the warranty was intended to apply to part of premises: *Taggart v. Risley*, 3 Or. 306.

In action for wages, defense that plaintiff did not work diligently must be pleaded: *Albee v. Albee*, 3 Or. 321.

What is a sufficient plea of the statute of limitations of another state: *Crawford v. Roberts*, 8 Or. 324.



**Answers and Defenses** (continued).

Payment cannot be pleaded as a counterclaim, but may be proved under a general allegation of payment: *Hendrix v. Gore*, 8 Or. 406.

Lack of funds to repair is matter of defense, in action against city officers for injury by defective bridge: *Rankin v. Buckman*, 9 Or. 253.

Final settlement between partners as a defense to bill for an accounting must be pleaded: *Gleason v. Van Aernam*, 9 Or. 343.

Right of defendant in foreclosure suit to answer co-defendants: *Ladd and Tilton v. Mason*, 10 Or. 308.

An unexecuted agreement to arbitrate is no defense to an action on a contract: *Savage v. Glenn*, 10 Or. 440.

Equitable rights, estates, or estoppel cannot be pleaded as defenses in action of ejectment: *Newby v. Rowland*, 11 Or. 133.

In an action against a sheriff for conversion, answer justifying under seizure on attachment must allege that the attachment debtor was the owner of the property: *Krewson v. Purdom*, 11 Or. 266.

Answer in justification in action for conversion in seizing of property by Indian agent must allege that person in possession was a white person or Indian: *Webb v. Nickerson*, 11 Or. 382.

In answer alleging deceit, the pleader must show wherein the representations were false,—must allege facts, not conclusions: *Specht v. Allen*, 12 Or. 117; *Misner v. Knapp*, 13 Or. 135.

In all actions in the nature of trespass, justification as a defense must be specially pleaded: *Gee v. Culver*, 12 Or. 228; *Konigsberger v. Harvey*, 12 Or. 286.

But affirmative matter not amounting to justification may be joined to a denial, and need not be pleaded separately: *Konigsberger v. Harvey*, 12 Or. 286.

In divorce, admission of the charge, in certain cases under the statute, to show in bar that the suit has not been commenced within a year, must be by answer, and not merely by demurrer: *Rice v. Rice*, 13 Or. 337.

In conversion, plea of title in a third person is not new matter: *Krewson & Co. Purdom*, 13 Or. 563.



**Answers and Defenses** (continued).

But *quære*, whether such fact can be proved under mere denial of plaintiff's title: *Id.*

In replevin a claim of possession by virtue of a special property must be pleaded as new matter, and cannot be shown under denial of plaintiff's right: *Guille v. Wong Fook*, 13 Or. 577.

*Semble*, that under general issue plaintiff may prove absolute ownership in himself or third person: *Id.*

Statute of another state relied on as a defense must be pleaded: *Balfour v. Davis*, 14 Or. 47.

Answer charging fraud and misrepresentation as a defense in a suit on a contract of guaranty under seal, held insufficient in law: *Marx v. Schwartz*, 14 Or. 177.

Answer setting up conditional contract of sale unfulfilled, as defense on promissory note for purchase price, must show an offer to reconvey: *Kenworthy v. Merritt*, 2 W. T. 155.

**Appeal and Error.** See Pleadings; Practice; Review, Writ of.

1. NATURE AND RIGHT.

2. NOTICE OF APPEAL.

3. PRECIPUE AND ASSIGNMENT OF ERRORS.

4. NOTICE OF ERROR.

5. BILL OF EXCEPTIONS AND STATEMENT.

6. UNDERTAKING.

7. TRANSCRIPT AND RECORD.

8. EFFECT.

9. DISMISSAL.

10. PRACTICE.

11. ERRORS AND QUESTIONS CONSIDERED.

1. NATURE AND RIGHT.

Lies from decision of commissioners to District Court on contest about a ferry: *Carothers v. Wheeler*, 1 Or. 194.

The granting or refusing motion for a new trial is not a final order from which appeal or writ of error lies: *Bowen v. State*, 1 Or. 270; *State v. Fitzhugh*, 2 Or. 227; *State v. Wilson*, 6 Or. 428; *Hallock v. City of Portland*, 8 Or. 29; *State v. McDonald*, 8 Or. 113; *State v. Drake*, 11 Or. 396; *State v. Mackey*, 12 Or. 154; *Kearney v. Snodgrass*, 12 Or. 311; *State v. Becker*, 12 Or. 318; *Tucker v. Flouring Mills Co.*, 13 Or. 28; *Wassissimi v.*

**Appeal and Error** (continued).

Territory, 1 W. T. 6; *Smith v. United States*, 1 W. T. 262; *McCormick v. W. W. & C. R. R. Co.*, 1 W. T. 512; *Jones v. Wiley*, 1 W. T. 603; *Page v. Rodney*, 2 W. T. 461.

In absence of fixed time to take appeals from land-office to general land-office of United States, party entitled to reasonable time and no more: *Moore v. Fields*, 1 Or. 317.

Lies in all cases from final decisions of Justice's Courts and County Courts: *Blanchard v. Bennett*, 1 Or. 328.

Appeal and review are concurrent remedies: *Id.*; *Shirott v. Phillippi*, 3 Or. 484; *contra*, *Evans v. Christian*, 4 Or. 375; *Sellers v. City of Corvallis*, 5 Or. 273; *Ramsey v. Pettengill*, 14 Or. 207; *Summers v. Harrington*, 14 Or. 480.

But are concurrent remedies to vacate a void judgment rendered by a justice of the peace: *Prickett v. Cleek*, 13 Or. 415.

From County Court, no other issues than those heard below can be tried: *Cain v. Harden*, 1 Or. 360.

Does not lie from judgment by default: *Ryan v. Harris*, 2 Or. 175.

Nor from justice's judgment less than twenty dollars, though the amount in controversy be greater: *Stoll v. Hoback*, 2 Or. 225.

Nor from order of Circuit Court refusing leave to bring action against a private corporation: *State v. Oregon Central R. R. Co.*, 2 Or. 255.

Order partially removing cause to United States court not reviewable: *Fields v. Lamb*, 2 Or. 340.

Such order does not affect a substantial right, or prevent judgment within section 525 of the Code (sec. 535, *Hill's A. L.*): *Id.*

Does not lie to Circuit Court from decision of register of state lands, La Grande district: *Anderson v. Laughery*, 3 Or. 277.

No appeal from judgment for want of an answer: *Fassman v. Baumgartner*, 3 Or. 469; *Smith v. Ellendale Mill Co.*, 4 Or. 70; *Trullenger v. Todd*, 5 Or. 36.

Order assigning custody of minor children in divorce case is appealable: *Pittman v. Pittman*, 3 Or. 472.

Appeal involves trial of fact and law; review, questions of law only: *Schirott v. Phillippi*, 3 Or. 484.

**Appeal and Error** (continued).

After expiration of time to appeal from a justice's judgment, the right to review still exists: *Id.*; *Evans v. Christian*, 4 Or. 375; *Sellers v. City of Corvallis*, 5 Or. 273; but this is not the rule as to judgments of the County Court: *Broback v. Huff*, 11 Or. 395; and is expressly overruled as to justice's judgments: *Ramsey v. Pettengill*, 14 Or. 207; *Summers v. Harrington*, 14 Or. 480.

Judgment for want of answer, when rendered without jurisdiction, may be appealed from: *Smith v. Ellendale Mill Co.* 4 Or. 70; *Trullenger v. Todd*, 5 Or. 36.

Decision of Circuit Court as to costs may be reviewed on appeal: *Cross v. Chichester*, 4 Or. 114.

Party cannot accept judgment, and enter satisfaction, and then appeal from it: *Moore v. Floyd*, 4 Or. 260; *Lyons v. Bain*, 1 W. T. 482.

Purchaser at void administrator's sale has no right of appeal from order of sale or confirmation: *Levy v. Riley*, 4 Or. 392.

A judgment, although void, may be appealed from: *Trullenger v. Todd*, 5 Or. 36.

Order, to be appealable, must not only affect a substantial right, but terminate the action: *State v. Brown*, 5 Or. 119.

Lies from judgment of city recorder of Corvallis to Circuit Court: *Sellers v. City of Corvallis*, 5 Or. 273; *City of Corvallis v. Stock*, 12 Or. 391.

Term appointed by order of Supreme Court is a regular term within the statute of appeals: *Moore v. Packwood*, 5 Or. 325.

From city council of Portland, in laying out streets, to Circuit Court, must be taken from the whole judgment, and the trial is *de novo*: *City of Portland v. Kamm*, 5 Or. 362.

Appeal, *mandamus*, or writ of review are the proper means by which Circuit Court exercises supervisory control over County Court, and not injunction: *Road Co. v. Douglas Co.*, 5 Or. 373.

Does not lie from justice's judgment rendered after striking out answer, defendant refusing to plead: *Long v. Sharp*, 5 Or. 438.

**Appeal and Error** (continued).

- On death of party, his representatives cannot appeal until they have obtained an order allowing continuance in their names: *Dick v. Kendall*, 6 Or. 166.
- Between time of death and allowance of such order, suit is suspended, and such period is not deemed any part of the time for taking appeal: *Id.*
- Party may voluntarily pay the judgment and then appeal: *Edwards v. Perkins*, 7 Or. 149.
- Abandonment of appeal, after serving notice thereof, does not preclude appellant from appealing again within the time limited for taking appeals: *Holladay v. Elliott*, 7 Or. 483.
- Appeal does not lie from order made by County Court in transacting county business: *Mountain v. Multnomah County*, 8 Or. 470.
- Does not lie from judgment of city recorder of La Fayette when rendered in a city case: *Town of La Fayette, v. Clark*, 9 Or. 225.
- Final order in administration proceedings having been duly entered, cannot, by order at subsequent term, be so amended that appeal will lie from the latter order after time for appealing from the original order has expired: *Harvey's Heirs v. Wait*, 10 Or. 117; but see *Lee v. Imbrie*, 13 Or. 510.
- Where the parts of a decree are severable, a party may accept the portion favorable to him, and issue execution thereon, and appeal from the remainder: *Inverarity v. Stowell*, 10 Or. 261.
- Appeal lies from order of confirmation of sheriff's sale: *Dell v. Estes and Carter*, 10 Or. 359.
- To review a judgment awarding costs, appeal from the judgment is proper; but where it is sought to review erroneous taxation of costs, appeal should be taken from the determination settling the amount thereof: *Burt v. Ambrose*, 11 Or. 26.
- Lies only when the controversy as to all parties to the action has been finally determined: *Watkins v. Mason*, 11 Or. 72.
- Lies from order dissolving or refusing to dissolve attachment: *Sheppard v. Yocum*, 11 Or. 234; *Suffern v. Chisholm*, 1 W. T. 486.



**Appeal and Error** (continued).

Does not lie from an order of the Circuit Court on petition for the removal of an assignee of an insolvent: *In re Goldsmith*, 12 Or. 414.

From Justices' Court is means of obtaining right of trial by jury, and practice should be liberal: *Hosford v. Logus*, 13 Or. 130.

Appeal, and not injunction, is the remedy to prevent enforcing an erroneous judgment for costs: *Nicklin v. Hobin*, 13 Or. 406.

Justice's Code, as to appeals, is complete in itself; and section 527 of the Civil Code (sec. 537, Hill's A. L.) does not apply to appeals from Justices' Courts: *Odell v. Gotfrey*, 13 Or. 466.

Circuit Court acquires no jurisdiction on appeal unless statute is strictly pursued: *Steel v. Rees*, 13 Or. 428.

Where a long time after a final order is entered it is corrected by *nunc pro tunc* order, it seems right of appeal runs from the date of the latter order: *Lee v. Imbrie*, 13 Or. 510.

Appeal and review are concurrent remedies from a void judgment in default: *Prickett v. Cleek*, 13 Or. 415.

On appeal in a forcible entry and detainer case, the undertaking for twice the rental value of the premises is a prerequisite on the part of the defendant appealing: *Danvers v. Durkin*, 14 Or. 37.

Decree in partition which determines the rights of the parties and leaves nothing to be done but to carry it into effect by appointment of referees, etc., is final, and appeal lies therefrom: *Walker v. Goldsmith*, 14 Or. 125.

Lies from an order settling and allowing receiver's fees: *Martin v. Martin*, 14 Or. 165.

Appeal from such order is a special proceeding not covered by the general statute relating to appeals, and may be taken under rule 14 of Supreme Court: *Id.*

Decree of divorce is not subject to review, though there be proceedings in the suit that may be reviewed: *Madison v. Madison*, 1 W. T. 60; *contra*, *Tierney v. Tierney*, 1 W. T. 568.

Appeal lies to Supreme Court of Washington Territory only in the cases specified in section 356, page 199, Laws of 1854: *Puget Sound Agr. Co. v. Pierce Co.*, 1 W. T. 76.



**Appeal and Error** (continued).

The *status* of the appellant in the Supreme Court is derived from the order of the court below: *Id.*

Provisions of the statute which are preliminary in their character must be complied with, to confer jurisdiction on appeal: *Id.*

No appeal lies from the action of the board of county commissioners in locating county roads, except on the single question of damages: *King County v. Neely*, 1 W. T. 241.

How appeals from board of county commissioners should be taken: *Id.*

Whether appearance of the opposite party, on appeal from the board of commissioners, without making objection, cures irregularities in taking the appeal: *Id.*

Appeal is abolished by section 445 of the Practice Act of 1873, which is confirmed by act of Congress, 1874, though contrary to the Organic Act: *Mann v. Young*, 1 W. T. 454.

By accepting the fruits of a decree, party is estopped from appealing: *Lyons v. Bain*, 1 W. T. 482.

An order dissolving an attachment is a final order from which appeal or writ of error lies: *Suffern v. Chisholm*, 1 W. T. 486.

Where such order is made by the judge at chambers and not by the court, the order is void, and cannot be reviewed by the Supreme Court: *Id.*

When notice of appeal is filed with the justice of the peace and copy served, appeal is taken; but to stay proceedings it is necessary to file a bond and make entry of the allowance of appeal in the justice's docket: *Seattle Coal and Trans. Co. v. Lewis*, 1 W. T. 488.

Right of appeal and the mode of taking the same, under the various codes of Washington Territory: *Garrison v. Cheeney*, 1 W. T. 489.

Legislature cannot provide for appeal from an order of the District Court granting or refusing new trial: *McCormick v. Walla Walla & C. R. R. Co.*, 1 W. T. 512.

The legislature must provide a mode in which the appellate power of the Supreme Court is to be exercised: *McGowan v. Petit*, 1 W. T. 514.

**Appeal and Error** (continued).

Divorce act of 1863, forbidding the reversal of any final order of the District Court divorcing parties, is to such extent in violation of the Organic Act and void: *Tierney v. Tierney*, 1 W. T. 568.

Order awarding custody and fixing the allowance for support of a child, in divorce proceedings, is merely interlocutory, and not subject to review: *Id.*

Appeal in equity allowed by the Organic Act is the right to a new trial upon the pleadings and evidence that were before the lower court: *Coleman v. Yesler*, 1 W. T. 591.

Legislature cannot abridge such right, but may prescribe a course to be pursued by the party availing himself of the right given: *Id.*

Legislative enactment requiring party to indicate what part of the proceedings he appeals from, and to define such part, and to make specific statement of what is erroneous, does not in any wise abridge the right to appeal, nor destroy the distinction between an appeal and a writ of error: *Id.*

Such statement and specification of error is not based upon the idea that the decision of the lower court is left standing, but is simply a regulation for convenience in procedure: *Id.*

Where the findings of fact made by the trial judge are not as broad as the issues, or are insufficient, remedy is by motion for further findings, and not by appeal: *Eakin v. McCraith*, 2 W. T. 112.

Under section 453 of the Code, a party to a judgment has full six months within which to decide whether he will appeal: *Crawford and Harrington v. Haller*, 2 W. T. 161.

Construction of the act of 1883 respecting appeals; the act is cumulative and complete, and does not repeal sections 458, 459, and 460 of the Code of 1881: *Bremer v. Burgess*, 2 W. T. 290.

Appeal does not lie from an order granting or modifying a temporary injunction: *N. P. R. R. Co. v. W. F. & Co.*, 2 W. T. 303.

Appeals can only be taken from final judgments, orders, and decisions: *McCormick v. W. W. & C. R. R. Co.*,

**Appeal and Error** (continued).

1 W. T. 512; *N. P. R. R. Co. v. W. F. & Co.*, 2 W. T. 303; *Jennings v. Bartels*, 2 W. T. 306; *Conway v. U. S. of America*, 2 W. T. 336.

After giving notice of appeal, and entry thereof on the journal, under the act of 1883, which has the effect of transferring the cause, an appeal cannot be taken under the Code of 1881, because no judgment remains in the District Court: *Conway v. U. S. of America*, 2 W. T. 336.

In the absence of joinder of a co-party in the appeal, or his appearance, or notice served upon him, the Supreme Court is not invested with jurisdiction of the cause: *Parker v. Denny*, 2 W. T. 360.

If case be dismissed for want of transcript, another writ of error may be prosecuted within the time allowed by law: *Roberts and Hoyt v. Tucker*, 1 W. T. 179.

Ruling of District Court on a motion to vacate final judgment is not itself a final judgment reviewable on writ of error: *Hancock v. Stewart*, 1 W. T. 323.

After expiration of the time for taking writ of error, jurisdiction cannot be had in the Supreme Court, even with consent of the parties: *Stark v. Jenkins*, 1 W. T. 421.

Manner of transferring cases to the Supreme Court is entirely statutory: *Lytle v. Territory*, 1 W. T. 435.

Except in case provided for in section 445 of the Practice Act of 1873, a final determination of the District Court must be taken to the Supreme Court by writ of error: *Mann v. Young*, 1 W. T. 454.

Repeal of Code of 1871, and adoption of writ of error under the statutes of 1873, operates to require proceedings, in cases where time for appeal had not expired before the adoption of the Code of 1875, to be in accordance with the latter Code: *Garrison v. Cheeney*, 1 W. T. 489.

Writ of error need only be prosecuted in the name of the party aggrieved by the decision of the lower court: *Id.*

Under the provisions of the Code of 1881, an action at law cannot be reviewed in the Supreme Court by appeal, but must be brought by writ of error: *Wilson v. Wald and Campbell*, 2 W. T. 376.

**Appeal and Error (continued).****2. NOTICE OF APPEAL.***a. The Notice.*

Notice, and certificate of attorney therein to the existence of error, not amendable: *Dolph v. Nickum*, 2 Or. 202.

Where notice of appeal from Justice's Court specified judgment for \$57.75, and transcript \$52.50, appeal dismissed: *Chipman v. Bronson*, 3 Or. 320.

Need not specify errors relied on in criminal case; rule adopted requiring statement on demand: *State v. Ellis*, 3 Or. 497.

Certificate of attorney in notice of appeal must not only allege error, but state in what particulars the judgment is erroneous: *Fulton v. Earhart*, 4 Or. 61.

Notice of appeal from a decree need not specify grounds of error: *Lewis v. Lewis*, 4 Or. 209.

Requisites of notice of appeal: *Id.*; *Christian v. Evans*, 5 Or. 253; *Oliver v. Harvey*, 5 Or. 360; *Weiss v. Jackson County*, 8 Or. 529; *Luse v. Luse*, 9 Or. 149; *Neppach v. Jordan*, 13 Or. 246.

Parties cannot waive notice so as to give appellate court jurisdiction: *Oliver v. Harvey*, 5 Or. 360; *Wolf v. Smith*, 6 Or. 73.

No notice appearing in the transcript, the court has no jurisdiction notwithstanding parties appear: *Wolf v. Smith*, 6 Or. 73.

No error not specified in notice considered, except lack of jurisdiction appearing in the record: *McKay v. Freeman*, 6 Or. 449; *State v. McKinnon*, 8 Or. 487; *Weissman v. Russell*, 10 Or. 73.

"That the court rendered judgment on the verdict." is a sufficient specification of an alleged error in the form of the verdict: *Jones v. Snider*, 8 Or. 127.

"Decision and judgment are against law,"—too indefinite a specification of error: *State v. McKinnon*, 8 Or. 487.

Notice of appeal to the Supreme Court must be signed by attorney of record, and cannot be signed by appellant himself: *Poppleton v. Nelson*, 10 Or. 437.

Change of attorneys, not substituted of record, does not alter this requirement: *Id.*

"Admitting or excluding testimony as shown by the bill of exceptions," is too indefinite a specification of error:



**Appeal and Error** (continued).

N. P. Terminal Co. v. Lowenberg, 11 Or. 286; *contra*, Krewson & Co. v. Purdom, 13 Or. 563.

Notice of appeal in proceedings supplemental to execution must specify errors relied on: Williams v. Gallick, 11 Or. 337.

Sufficiency of notice must appear on its face; court cannot inquire whether in fact it gives respondent notice: Neppach v. Jordan, 13 Or. 246.

For the possession of the premises described in the complaint," — sufficient description of the judgment and the premises in the notice: *Id.*

A notice is sufficient in which the essential facts required in a notice may be made out by reasonable intentment: *Id.*

Misdescription of date of judgment in notice is waived by appearing and obtaining continuance: Moorehouse v. Donica, 13 Or. 435.

On appeal from Justice's Court, notice which makes known that an appeal is taken in the particular case is sufficient: Lancaster v. McDonald, 14 Or. 264; Starks v. Stafford, 14 Or. 317.

In such appeal, a notice which names the plaintiff, Amanda H. Starks, as "A. H. Starks," is sufficient: Starks v. Stafford, 14 Or. 317.

In case of appeal, a specification of errors claimed to have been committed is necessarily similar to that which constitutes the assignment of errors, in a suit in error: Coleman v. Yesler, 1 W. T. 591.

Notice of appeal and notice in case of error do not necessarily assume the same form: Parker and Boyer v. Denney, 2 W. T. 176.

The one contains a particular description of the errors assigned; the other contains a specific list of injurious rulings, order, or decisions: *Id.*

The object of both is to narrow the range of controversy and to apprise the opposite party and the appellate court of its intent: *Id.*

At common law, an assignment of error is a pleading whose allegations are to be tested by the record, and the statutory notice is essentially the same: *Id.*



**Appeal and Error** (continued).

A notice of appeal is not in the nature of a pleading, but rather of an election, but the same rules of brevity and simplicity should apply: *Id.*

Sufficient in notice of appeal to state that appellant has been aggrieved by the orders, rulings, and decisions following, and then severally enumerate them by descriptions sufficient to identify each: *Id.*

Giving of notice of appeal and the entry of the same in the journal of the trial court, under the act of 1883, has the effect of transferring the cause to the Supreme Court: *Meeker v. Gardella*, 2 W. T. 355.

If a co-party does not join an appeal or voluntarily appear in the Supreme Court, he must be served with a notice of appeal provided by statute: *Parker v. Denny*, 2 W. T. 360.

Notice of an intention to appeal is not notice of an appeal actually prosecuted: *Id.*

When notice of appeal is entered in the record of the District Court prior to the order sought to be appealed from, both being in the records of the same day, the presumption is, that the judgment has been first entered: *P. S. I. Co. v. Worthington*, 2 W. T. 472.

*b. Service and Return.*

Where last day falls on Sunday, service may be made on Monday following: *Carothers v. Wheeler*, 1 Or. 196.

It must appear that the notice was served on the party or his attorney, and filed: *Strang v. Keith*, 1 Or. 312.

On appeal, return of service of notice may be amended: *Dolph v. Nickum*, 2 Or. 202; *Seeley v. Sebastian*, 3 Or. 563.

In the county, service of notice may be on the party or his attorney; outside of county, on party only: *Lindley v. Wallis*, 2 Or. 203; *Rees v. Rees*, 7 Or. 78.

When service is made by leaving at office or residence, return must show that it was left between the hours fixed by statute: *Rees v. Rees*, 7 Or. 78.

Manner of such service may be in accordance with title 3, page 278, of Code (p. 469, Hill's A. L.): *Id.*

Notice of appeal from justice's decision may be served on the party or his attorney, if residing in the county: *Carr v. Hurd*, 3 Or. 160.

**Appeal and Error** (continued).

Service and return in criminal case; service when respondent is not a resident of county: *State v. Brown*, 5 Or. 119.

Proof of service in the form of an indorsement must be on the notice when filed, or appeal is not perfected: *Briney v. Starr*, 6 Or. 207.

Subsequent making or amendment of such proof can only be done in the court below after leave: *Id.*

Presumed that service was made within the county of the sheriff making the return: *Roy v. Horsley*, 6 Or. 270.

Presumed that the attorney served was resident of the county where he was served and practicing: *Id.*

Service and return of notice of appeal from a Justice's Court may not be made by the appellant himself: *Saunders v. Pike*, 6 Or. 312; *Gee v. McMillan*, 14 Or. 270.

Service on attorney can be made only when he is a resident of the county: *Rees v. Rees*, 7 Or. 78.

On appeal from Justice's Court in criminal case, service must be made on district attorney or private prosecutor: *State v. Zingsem*, 7 Or. 137.

Service on non-resident by serving on the clerk is sufficient, although the attorney for the respondent, residing in another county, may know respondent's residence: *Holladay v. Elliott*, 7 Or. 483.

Service of the notice must precede filing the undertaking, and simply refileing the latter after is insufficient: *Weiss v. Jackson County*, 8 Or. 529.

Service by constable must show that the notice was served in his precinct: *Sloper and Kelso v. Carey*, 9 Or. 511.

County clerk cannot accept service and waive copy of notice for the county as respondent: *Read v. Benton County*, 10 Or. 154.

Mistake of constable in not serving notice of appeal does not excuse appellant: *Scoggin v. Hall*, 12 Or. 372.

On appeal from Justice's Court, notice need not be served on the attorney: *Byers v. Cook*, 13 Or. 297.

Objection to sufficiency of service of notice of appeal from Justice's Court must be taken in the Circuit Court, or will not be considered in the Supreme Court: *Lancaster v. McDonald*, 14 Or. 264.

**Appeal and Error** (continued).

Service of notice of appeal on the clerk of the District Court is essential in order to confer jurisdiction upon the Supreme Court: *Blinn v. Crosby*, 2 W. T. 109.

**3. PRECIPES AND ASSIGNMENT OF ERRORS.**

Where precipe directs notice to issue to the adverse party to appear at a term subsequent to the next term following the filing of the precipe, no appeal is taken, and on motion case should be dismissed: *Roberts and Hoyt v. Tucker*, 1 W. T. 179.

There being no precipe, and the record affording a court no means of deciding whether error was committed, judgment is affirmed: *Miskel v. Stone*, 1 W. T. 229.

Act of 1865 required that a precipe perform the functions of a precipe, and also those of the paper called assignment of errors under the act of 1862: *McAlmond v. Adams*, 1 W. T. 230.

The particularity of statement in a precipe is analogous to the particularity of statement of a cause of action in a complaint in the lower court: *Id.*

What particularity of description of errors is required in precipe: *Id.*

Mere classification of errors, as in this case, not sufficient: *Id.*

Specific errors must be pointed out and individualized by a description in the precipe: *Id.*

This particularity of description must be contained in the precipe without the aid of the transcript: *Id.*

Motion for leave to amend precipe by assignment of errors, where none are assigned in the court below, should be denied: *Shorey v. Wyckoff*, 1 W. T. 348.

Precipe must contain a particular description of the judgment to correct which the writ of error is sued out: *Carr v. King County*, 1 W. T. 418.

In suing out a writ of error, no assignment of errors can be made except in the precipe: *Lytle v. Territory*, 1 W. T. 435.

Precipe for a writ is analogous to a complaint in the District Court, while a notice thereof to be served on the adverse party or his attorney stands in place of a summons: *Schwabacher v. Wells*, 1 W. T. 506.

**Appeal and Error** (continued).

By means of the former, jurisdiction is acquired of the subject-matter, and of the person by the latter: *Id.*

Needless and superfluous assignment of error tends to confusion, and is in effect no assignment, and would justify the court in affirming the judgment of the lower court as for want of proper assignment of errors: *Brewster v. Baxter*, 2 W. T. 135.

No assignment of errors is contemplated under the act of 1883 other than may be required by a rule of the Supreme Court: *Breemer v. Burgess*, 2 W. T. 290.

Rule 5 of the Supreme Court requires service of assignment of errors under said act: *Collins v. City of Seattle*, 2 W. T. 354; *Parker v. Dacres*, 2 W. T. 362; *Brown v. Hazard*, 2 W. T. 464.

There being no assignment of errors in a legal action, the appeal should be dismissed: *Brown v. Hazard*, 2 W. T. 464.

Party who has failed to make an assignment of errors pertaining to his legal defense cannot have matters growing out of an equitable defense heard in the Supreme Court: *Id.*

**4. NOTICE OF ERROR.**

Notice of suing out writ of error under statutes of 1869 must be to the adverse party; notice directed to the attorney insufficient: *Driver v. McAllister*, 1 W. T. 367.

Acknowledgment of such notice not good unless it discloses time, place, and manner of service: *Id.*

Imperfect indorsement of signature of attorney to said notice, accepting service thereof, may be made perfect by aid of the record: *Id.*

Service of notice of taking writ of error upon A. Phinney does not well show a service upon the defendant Arthur Phinney: *Waterman and Katz v. Phinney*, 1 W. T. 415.

The return should show that service was had in the county of the sheriff making service: *Id.*

Precipe for a writ is analogous to a complaint in the District Court, while a notice thereof to be served on the adverse party or his attorney stands in place of a summons: *Schwabacher v. Wells*, 1 W. T. 506.

By means of the former, jurisdiction is acquired of the subject-matter and of the person by the latter: *Id.*



**Appeal and Error** (continued).

Defective service of the notice is waived by appearance: *Id.*

Acknowledgment of the clerk of the lower court, under seal, of the service of a notice of writ of error required to be served on him, is not proof of service, nor does such acknowledgment constitute color of service: *Port Blakeley Mill Co. v. Clymer*, 1 W. T. 607.

The return of the officer or the affidavit of the party making the service affords the proof provided by statute, and unless the record shows such proof, or there be waiver, the court has no jurisdiction: *Id.*

Notice of appeal and notice in case of error do not necessarily assume the same form: *Parker and Boyer v. Denney*, 2 W. T. 176.

The one contains a particular description of the errors assigned; the other contains a specific list of injurious ruling, orders, or decisions: *Id.*

The object of both is to narrow the range of controversy, and to apprise the opposite party and the appellate court of its extent: *Id.*

At common law an assignment of error was a pleading whose allegations were to be tested by the record, and the statutory notice is essentially the same: *Id.*

In suing out writ of error in criminal cases, where service on the United States is necessary, the United States attorney is the only person on whom service can be made, and service on his assistant will not avail: *Bennett v. United States*, 2 W. T. 179.

5. **BILL OF EXCEPTIONS AND STATEMENT.**

Bill of exceptions must be signed and sealed by the judge, and be part of the record: *Thompson v. Backenstos*, 1 Or. 17.

Omission of clerk to file the bill of exceptions does not prejudice parties' rights: *Cline v. Broy*, 1 Or. 89.

Object of statement is to make that matter of record which before was not: *Rickey v. Ford*, 2 Or. 251.

Statement is not necessary in all appeals: *Id.*; *Pittman v. Pittman*, 3 Or. 472.

Order enlarging time within which statement may be made and served must be made within the time fixed by law for the performance of these requirements: *Seeley v. Sebastian*, 3 Or. 563.



**Appeal and Error** (continued).

In criminal cases bill of exceptions must show that the questions were raised in the court below: *Fulton v. Earhart*, 4 Or. 64.

Bill of exceptions should be presented, allowed, and signed prior to first day of term after trial: *Holcomb v. Teal*, 4 Or. 352; *contra*, *Ah Lep v. Gong Choy and Gong Wing*, 13 Or. 205.

Must state enough concerning the evidence given to show whether instructions asked were proper: *Richards v. Fanning*, 5 Or. 356; *State v. Lee Yan Yan*, 10 Or. 365; *Yelm Jim v. Washington Territory*, 1 W. T. 63; *Brown Brothers & Co. v. Forest*, 1 W. T. 201; *Thompson v. Washington Territory*, 1 W. T. 547; *Or. R. & N. Co. v. Galliher*, 2 W. T. 70.

How exceptions should be taken: *Richards v. Fanning*, 5 Or. 356; *Murray v. Murray*, 6 Or. 17; *Kearney v. Snodgrass*, 12 Or. 311.

Exhibit attached and referred to in the bill of exceptions is a part thereof: *Morrison v. Crawford*, 7 Or. 472; *Oregonian Railway Co. v. Wright*, 10 Or. 162.

And this, though such attached exhibit is not marked "exhibit" in any manner: *Oregonian Railway Co. v. Wright*, 10 Or. 162.

Statement of the testimony and rulings, not signed by the judge, though certified as correct by the attorneys for both parties, is insufficient: *Singer Mfg. Co. v. Graham*, 8 Or. 17.

Must show all evidence relating to challenge of juror, or the alleged error will not be reviewed: *State v. Tom, a Chinaman*, 8 Or. 177; *Hayden v. Long*, 8 Id. 244; *McAllister v. Washington Territory*, 1 W. T. 360.

So where abuse of discretion in permitting a child to testify is claimed, the bill must contain all the evidence relating thereto: *State v. Jackson*, 9 Or. 457.

Motion for new trial and proceedings had thereon, to be considered, must be made a part of the bill of exceptions: *Oregonian Railway Co. v. Wright*, 10 Or. 162; *Chung Yow v. Hop Chong*, 11 Or. 220; *State v. Drake*, 11 Or. 396; *McAllister v. Territory*, 1 W. T. 360; but see *Bowen v. State*, 1 Or. 270; *Kearney v. Snodgrass and Minor*, 12 Or. 311; *State v. Becker*, 12 Or. 318.

**Appeal and Error** (continued).

Affidavit in support of motion for order to abate nuisance need not be made a part of the bill: *Ankeny v. Fairview Milling Co.*, 10 Or. 390.

The object of a bill of exceptions at common law and under the Code: *State v. Drake*, 11 Or. 396.

Order overruling motion for new trial and exceptions based thereon are not properly a part of a bill of exceptions: *Bowen v. State*, 1 Or. 270; *Kearney v. Snodgrass*, 12 Or. 311; *State v. Becker*, 12 Or. 318.

Bill of exceptions should be tendered immediately after trial unless time is extended, but settlement and allowance may be made at any reasonable time thereafter: *Ah Lep v. Gong Choy*, 13 Or. 205.

Judge refusing to sign may be compelled by *mandamus*; delay, in such case, does not prejudice appellant: *Id.*

Where bill is not tendered until after the close of the term and after extension of time to file has expired, judge has no power to sign: *Morgan v. Thompson*, 13 Or. 230.

Where party has once duly excepted to the ruling of the court, it is not necessary to renew the exception on motion for a new trial or in arrest of judgment, to preserve it: *Tolmie v. Day*, 1 W. T. 46.

Error must be excepted to at the time, and presented by bill of exceptions: *Hartigan v. Washington Territory*, 1 W. T. 447.

Under section 430, Civil Practice Act, 1873, the evidence in an equity case cannot be brought to the Supreme Court except by bill of exceptions: *Mann v. Young*, 1 W. T. 454.

Motion for new trial because of insufficiency of evidence, or because verdict is contrary to law, must clearly specify the grounds thereof, or bill of exceptions based thereon fails: *Jones v. Wiley*, 1 W. T. 603.

Naming the day for the settlement of a bill of exceptions may not be sufficient, in case of notice to the opposite party, without also designating an hour; but when a day for such purpose is stipulated for by the parties, neither can complain that the hour of hearing is not known: *City of Seattle v. Buzby*, 2 W. T. 25.

Only so much of the evidence need be stated in bill of exceptions as is required to explain the charge to the jury: *Id.*

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Evidence need not be set forth in bill of exceptions in detail: *Id.*

Bill of exceptions must show that instructions complained of upon a particular point were all the instructions given on that subject: *Oregon R. & N. Co. v. Galliher*, 2 W. T. 70.

A bill of exceptions has no place, and performs no office in a chancery court: *Parker and Boyer v. Denney*, 2 W. T. 176.

The facts contemplated in the statement provided in section 3 of the act of 1883 are material, evidentiary facts, propounded in the progress of a cause through the lower court: *Breemer v. Burgess*, 2 W. T. 290.

An *ex parte* affidavit filed with the papers of the case, but not made a part of the bill of exceptions, will not be noticed by the Supreme Court: *Fox v. Territory of Washington*, 2 W. T. 297.

Where an appeal is taken under the act of 1883, a bill of exceptions, subsequently signed by the judge, does not meet the requirements that the judge shall certify a statement containing all the material facts in the cause: *Collins v. City of Seattle*, 2 W. T. 354.

The statement of facts provided in section 3 of the act of 1883, relative to appeals, is intended to include everything material that transpired in the cause not otherwise a part of the record: *P. S. I. Co. v. Worthington*, 2 W. T. 472.

Both statement and bill of exceptions in the same case are not contemplated under the act of 1883: *Id.*

**6. UNDERTAKING.**

Must be filed within twenty days after the judgment in Justice's Court: *Strang v. Keith*, 1 Or. 312.

Firm name signed as surety binds partner signing same only, unless authorized by firm: *Charman v. Warner and McLane*, 1 Or. 339.

Insufficiency of, can be waived by respondent, and appellant cannot question: *Cain v. Harden*, 1 Or. 360.

No undertaking other than bail-bond necessary in criminal appeal: *State v. Ellis*, 3 Or. 497.

Undertaking must be filed within ten days after service of notice, or the appeal is not perfected: *Canyon Road*

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- Co. v. Lawrence, 3 Or. 519; Cross v. Chichester, 4 Or. 114; N. P. Terminal Co. v. Lowenberg, 11 Or. 286.
- Exceptions to sureties must be made within five days after the filing: Lewis v. Lewis, 4 Or. 209.
- Affidavits of sureties must be filed contemporaneously with undertaking: Holcomb v. Teal, 4 Or. 352; Alber-son v. Mahaffey, 6 Or. 412; State v. McKinmore, 8 Or. 207; Pencinse v. Burton, 9 Or. 178.
- When undertaking for stay of proceedings has been given, the Circuit Court, on motion, may recall an execution issued: Bentley v. Jones, 8 Or. 47.
- Undertaking must not be limited in amount: State v. McKinmore, 8 Or. 207.
- Notice must be served before undertaking is filed, and simply refiled latter after service is insufficient: Weiss v. Jackson County, 8 Or. 529.
- Motion for leave to file new undertaking, after motion to dismiss, must be accompanied by a showing that the defect in former undertaking occurred by excusable mistake: Pencinse v. Burton, 9 Or. 178; De Lashmutt v. Sellwood, 10 Or. 51.
- After the time for filing has expired, a new undertaking cannot be substituted, on exception to the sureties on former one being filed: Simison v. Simison, 9 Or. 335.
- On appeal from order of confirmation of judicial sale, undertaking to pay value of use of premises pending appeal is void as not provided for by statute, and does not bind the sureties: Bank of British Columbia v. Harlow and Page, 9 Or. 338.
- Such bond not being provided for by statute gives appellant no right to hold possession: Id.
- Undertaking may be filed same day as notice, and in such case is presumed filed after notice: Poppleton v. Nelson, 10 Or. 437.
- Though undertaking is filed before notice, upon motion to dismiss, a cross-motion being filed, leave may be granted, on proper terms, to file a new undertaking upon a showing of excusable mistake: Hawthorne v. City of East Portland, 12 Or. 210.
- Affidavit of qualification of sureties on appeal having been made prior to service of notice of appeal from Justice's



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Court, leave to perfect the appeal by filing new undertaking should be granted, or the motion to dismiss overruled: *Hosford v. Logus*, 13 Or. 130.

Undertaking is not defective if executed after judgment, though before notice was served: *Byers v. Cook*, 13 Or. 297.

The giving of a counter-undertaking by respondent to prevent stay of proceedings and to enforce the judgment, does not discharge the sureties on the appellant's undertaking: *Ah Lep v. Gong Choy*, 13 Or. 429.

The consideration for the counter-undertaking is the privilege of enforcing the judgment: *Id.*

Clerk should certify up both undertakings when counter-undertaking is given: *Id.*

Justice of peace has no power to permit filing of undertaking after the thirty days for taking appeal have expired: *Odell v. Gotfrey*, 13 Or. 466.

On appeal from justice, it is not essential that the appellant himself sign the undertaking; it is sufficient if signed by the sureties: *Drouilhat v. Rottner*, 13 Or. 493.

Undertaking for double rental value of premises is a prerequisite to appeal in a forcible entry and detainer case: *Danvers v. Durkin*, 14 Or. 37.

Affidavit of surety not stating the amount he is worth is fatally defective: *Starks v. Stafford*, 14 Or. 317.

**7. TRANSCRIPT AND RECORD.**

Transcript must be filed by second day of term, or Supreme Court has no jurisdiction: *Heatherly v. Hadley*, 2 Or. 119; *Dolph v. Nickum*, 2 Or. 205.

When time is too brief to prepare transcript, extension may be granted by circuit judge or Supreme Court: *Dolph v. Nickum*, 2 Or. 203.

Application for extension should be made within the time for filing: *Id.*

Transcript from Justice's Court on appeal, not sufficiently docketed when filed in Circuit Court, to allow execution to issue: *Chapman v. Raleigh*, 3 Or. 34.

Appellant must bring perfect record; lost originals, including notice of appeal, must be supplied by copies: *Wolf v. Smith*, 6 Or. 75.

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Affidavit in support of motion for order to abate nuisance is part of transcript: *Ankeny v. Fairview Milling Co.*, 10 Or. 390.

Order enlarging time to file transcript in criminal cases must be made by trial court: *State v. Bovee*, 11 Or. 57.

Referee's report in action at law is no part of the transcript: *Osborn v. Graves*, 11 Or. 526.

Whether by stipulation without order of court time to file transcript can be extended, *quære*: *Peterson v. Foss*, 12 Or. 81.

Transcript cannot be taken up and filed by respondent on appeal from Justice's Court, when the appellant neglects to do so: *Steel v. Rees*, 13 Or. 428.

Judgment of affirmance or reversal will not be entered unless a transcript be filed: *Roberts and Hoyt v. Tucker*, 1 W. T. 179.

Seven pieces of paper pinned together, each certified to be a copy of the correspondent paper in court below, with no other certificate, do not constitute a transcript: *Miskel v. Stone*, 1 W. T. 229.

Receipt of attorney, filed with the papers of the case, showing satisfaction of the judgment, is properly certified up as a part of the transcript: *Lyons v. Bain*, 1 W. T. 482.

A *pro forma* judgment cannot be recognized as final and entitled to review, unless the transcript contains the certificate prescribed in section 18, page 25, Laws of 1875: *McMullen v. McGilvrey*, 1 W. T. 513.

Written evidence within section 453, Civil Practice Act of 1877, for the purpose of appeal, defined: *Coleman v. Yesler*, 1 W. T. 591; *Seattle & W. W. R. R. Co. v. Ah Kow*, 2 W. T. 36.

Certificate authenticating a transcript held void, both for its indefiniteness and for want of a seal, and because the matter certified to is not a transcript: *Coleman v. Yesler*, 1 W. T. 591.

Upon good cause shown, a motion to amend the certificate or substitute a correct certificate would be allowed if thereby a perfect transcript could be obtained: *Id.*

The whole of the evidence must be certified on an appeal case: *Parker v. Denny*, 2 W. T. 360.

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A transcript not sent up in obedience to the statutory notice is not to be received by the Supreme Court: *Port Blakeley Mill Co. v. Clymer*, 1 W. T. 607.

Evidence in a cause can only be authenticated by the presiding judge of the lower court, or, in a proper case of written testimony, by the clerk: *Seattle & W. W. R. R. Co. v. Ah Kow*, 2 W. T. 36.

The judge in the lower court who decides the case is empowered to certify the evidence, though such evidence was taken before his predecessor: *Id.*

Certificate of a former judge or of the short-hand reporter gives no sanction to such evidence: *Id.*

Only when the evidence consists wholly of written testimony can it be certified to by the clerk. *Id.*

What degree of fullness and certainty is required in clerk's certificate of record authenticated in the lower court: *Steamboat Zephyr v. Brown*, 2 W. T. 44.

The provisions of the Code, that the clerk shall forthwith upon payment of his fees transmit a transcript of the record in the cause, does not require an unreasonable instantaneousness of action, and the appellant should look after and supervise the preparation of his transcript: *Crawford and Harrington v. Haller*, 2 W. T. 161.

The intent of the language in section 459 of the Code is, that the clerk shall, as quickly as may be consistent with the nature of the record and the appellant's actions and directions, send up the transcript: *Id.*

Failure of the transcript to reach the Supreme Court speedily is not to be imputed to negligence of the clerk until the presumption that he has acted as he ought is fairly rebutted: *Id.*

Certificate by the clerk that the evidence contained in the record is all the evidence in the cause reported to the trial court by the referee, to whom the cause was referred for taking and recording the evidence, is insufficient, as not showing that all the evidence in the case is certified: *Mulkey v. McGrew*, 2 W. T. 259.

Parties cannot waive such certificate by stipulation or estoppel: *Id.*

The Supreme Court will not take notice of an *ex parte*

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affidavit filed with the papers in the case, but not embodied in the bill of exceptions: *Fox v. Territory*, 2 W. T. 297.

Rules of trial courts are part of the record of every cause tried therein, but cannot be considered on appeal unless properly certified as part of the record: *W. W. P. & P. Co. v. Budd*, 2 W. T. 336.

In an appeal under the act of 1883, the evidence cannot be certified to the Supreme Court by the clerk of the District Court under the Code of 1881: *Meeker v. Gardella*, 2 W. T. 355.

When an appeal is taken under the Code of 1881, the evidence must be certified in accordance with the provisions of section 451 of that Code: *Parker v. Denney*, 2 W. T. 360.

Certificate of the district clerk failing to show that the evidence upon which the case is tried in the lower court has been certified to the Supreme Court, the appeal was dismissed: *Brown v. Hazard*, 2 W. T. 464.

Though the certificate of the clerk of the lower court fails to mention an assignment of errors, yet if the record shows the existence of the same properly served, there is no ground of dismissal: *P. S. I. Co. v. Worthington*, 2 W. T. 472.

Instructions of the lower court, returned into the appellate court as a separate paper with no other sanction than the clerk's certificate, are stricken from the files: *Id.*

Statement of facts coming to the Supreme Court separate from the transcript, bearing no evidence that it was transmitted with the transcript by the clerk of the District Court, cannot be considered by the appellate court as a part of the record: *Id.*

**8. EFFECT.**

On appeal by garnishee after paying judgment under protest, the duty of the sheriff is still to apply the money to the satisfaction of the judgment: *Dufernoy v. Stitzel*, 3 Or. 58.

Appeal does not affect conclusive nature of decision until the decision is reversed: *Warner v. Myers*, 3 Or. 218.

In criminal cases, does not vacate the judgment in the court below: *Whitley v. Murphy*, 5 Or. 328.



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A suit is deemed pending in the trial court until appeal is perfected, or time for taking has expired: *Dick v. Kendall*, 6 Or. 166; *Garrison v. Cheeney*, 1 W. T. 489. Circuit Court cannot render judgment against sureties on an undertaking on appeal from justice in a criminal case, where the notice of appeal and transcript are not filed: *State v. Zingsem*, 7 Or. 137.

Writ of error, under statute of 1873, is not the beginning of a new action, but a proceeding in a pending action: *Garrison v. Cheeney*, 1 W. T. 489.

The giving of a notice of appeal, and the entry of the same on the journal of the trial court under the act of 1883, has the effect of transferring the cause to the Supreme Court: *Meeker v. Gardella*, 2 W. T. 355.

**9. DISMISSAL OF.**

In a case where it was uncertain whether appeal was taken in good faith or not, on appeal being dismissed for want of prosecution, the damages fixed by statute were not allowed: *Coffin v. Hanner, Jennings, & Co.*, 1 Or. 236.

After appeal is perfected, on failure to file transcript, how respondent may obtain affirmance: *Heatherly v. Hadley and Owen*, 2 Or. 117; *Roberts and Hoyt v. Tucker*, 1 W. T. 179; *Roberts and Miner v. Bush*, 1 W. T. 181.

Motion to dismiss, on ground that no statement or bill of exceptions has been made, will not be entertained: *Rickey v. Ford*, 2 Or. 251; *Pittman v. Pittman*, 3 Or. 472.

Appeal from judgment for want of answer gives court no power except to dismiss: *Fassman v. Baumgartner*, 3 Or. 469.

Appeal will be dismissed on motion if the undertaking is not filed within ten days after service of notice: *Canyon Road Co. v. Lawrence*, 3 Or. 519; *Cross v. Chichester*, 4 Or. 114; *N. P. Terminal Co. v. Lowenberg*, 11 Or. 286.

When want of jurisdiction appears, court will, at any stage, of its own motion, dismiss: *Evans v. Christian*, 4 Or. 375; *Tolmie v. Dean*, 1 W. T. 46.

Dismissal is equivalent to affirmance of judgment if the appellate court had gained jurisdiction: *Simpson v. Prather*, 5 Or. 87.

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Court may dismiss appeal and affirm the judgment when appellant does not pay trial fee: *Bailey v. Frush*, 5 Or. 136.

Circuit Court dismissing appeal for want of jurisdiction cannot affirm judgment: *Long v. Sharp*, 5 Or. 439; *Neppach v. Jordan*, 13 Or. 246.

Appeal from justice in criminal case not being perfected, Circuit Court cannot render judgment against the appellant and his sureties on his bond, in dismissing the appeal: *State v. Zingsem*, 7 Or. 137.

Dismissal for defects in the undertaking does not operate as an affirmance: *State v. McKinnon*, 8 Or. 485.

That the errors assigned in the notice do not appear by the transcript, will not be considered on motion to dismiss: *De Lashmutt v. Sellwood*, 10 Or. 51.

Dismissal of appeal from order refusing *mandamus* cannot be had on the ground that another pending case involves the ultimate question of right in dispute: *Simon v. Durham*, 10 Or. 52.

Appeal dismissed where original paper was lost before transcript was sent up, and a sworn copy was attempted to be substituted in Supreme Court: *Corbitt and Macleay v. Bauer*, 10 Or. 340.

Such substitution must be made in the Circuit Court: *Id.*

Dismissal for want of service of notice on some parties, where decree can be rendered without affecting them, will not be granted: *Poppleton v. Nelson*, 10 Or. 437.

Appeal from Justice's Court should not be dismissed for defect in undertaking that the sureties made affidavit thereon, as to their qualification, prior to the service of the notice of appeal, where the appellant asks leave to perfect the appeal by filing new undertaking: *Hosford v. Logus*, 13 Or. 130.

Where the notice of appeal from Justice's Court is fatally defective, no judgment but for dismissal can be given: *Neppach v. Jordan*, 13 Or. 246.

Assignments in motion to dismiss, that court has no jurisdiction, no appeal has been perfected, and appellant never gave undertaking, are too general to be considered: *Byers v. Cook*, 13 Or. 297.

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Misdescription of date of judgment in notice of appeal from justice is waived by appearing, and, on motion, obtaining a continuance of the cause till the next term: *Moorhouse v. Donica*, 13 Or. 435.

On failure of plaintiff to file transcript, the defendant in error may dismiss for want of transcript, or secure a transcript and have the judgment affirmed or reversed: *Roberts and Hoyt v. Tucker*, 1 W. T. 179; *Roberts and Miner v. Bush*, 1 W. T. 181.

Unless it satisfactorily appears that the transcript contains all the evidence introduced at the trial in the court below without jury, appellate court has no jurisdiction, and must dismiss: *McGowan v. Petit*, 1 W. T. 514.

Appellant failing to show any cause whatever for failure to file the transcript in time, cause is dismissed: *Crawford and Harrington v. Haller*, 2 W. T. 161.

Appeal dismissed because a complete transcript is not certified to the Supreme Court, and because the brief of the plaintiff in error was not filed within the time prescribed by rule 10 of the Supreme Court: *Lewis v. Host*, 2 W. T. 402.

Appeal dismissed because it did not appear from the record that the notice of appeal was ever made, or filed with the clerk of the court in which judgment is rendered: *Crawford and Harrington v. Haller*, 2 W. T. 161; *Sayward v. Guye*, 2 W. T. 420.

Certificate of the district clerk failing to show that the evidence upon which the case is tried in the lower court has been certified to the Supreme Court, appeal was dismissed: *Perry v. Stone*, 2 W. T. 464.

There being no assignment of errors in a legal action, the appeal should be dismissed: *Brown v. Hazard*, 2 W. T. 464.

Though the certificate of the clerk of the lower court fails to mention assignment of errors, if the record shows the existence of the same properly served, there is no ground for dismissal: *P. S. I. Co. v. Worthington*, 2 W. T. 472.

**10. PRACTICE.**

In criminal cases, court may reverse or affirm but not modify judgment: *Howell v. State*, 1 Or. 241.

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On affirmance of appeal from County Court, judgment may be entered against principal and surety: *Charman and Warner v. McLane*, 1 Or. 339.

After default in County Court, defendant cannot put in answer on appeal: *Cain v. Harden*, 1 Or. 361.

Same issues as those tried in the County Court must be heard on appeal: *Id.*; *Moser v. Jenkins*, 5 Or. 447.

After failure to file transcript by second day of term, court has no jurisdiction except to dismiss: *Heatherly v. Hadley and Owen*, 2 Or. 117.

As a general rule, affirmance in appeal case is final, but court will hold control for rehearing: *McDonald v. Crusen*, 2 Or. 259.

Jurisdiction of Supreme Court is appellate and revisory only, and after mandate is sent below, order will not be made substituting heirs of parties since deceased: *Boon v. McClane*, 2 Or. 331.

Court acquires no jurisdiction except to dismiss, on appeal from judgment for want of answer: *Fassman v. Baumgartner*, 3 Or. 469.

Too late to apply for leave to perfect after motion to dismiss has come on for hearing: *Cross v. Chichester*, 4 Or. 114; *Alberson v. Mahaffey*, 6 Or. 412; *State v. McKinmore*, 8 Or. 207.

Affidavits in support of cross-motion should be filed before motion brought on for hearing: *Id.*

When appeal in criminal case abates by death of accused, judgment is left in force for costs: *Whitley v. Murphy*, 5 Or. 328.

In equity suits, the case must be tried anew on transcript and evidence: *Howe v. Patterson*, 5 Or. 354; *O'Leary v. Fargher*, 11 Or. 225, overruling *Fahie v. Lindsay*, 8 Or. 474.

No amendment in Circuit Court changing the issues tried in Justice's Court allowed on appeal: *Moser v. Jenkins*, 5 Or. 448; *Monroe v. N. P. Coal Mining Co.*, 5 Or. 510.

The appellant is the "moving party," and must advance the trial fee: *Bailey v. Frush*, 5 Or. 136.

Amendment not changing issues tried in County Court may be allowed on appeal: *Monroe v. N. P. Coal Mining Co.*, 5 Or. 510.



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- The respondent in an equity suit failing to appear in the Supreme Court is presumed to have abandoned the appeal, and on appellant making *prima facie* case, decree reversed: *Donegan v. Murphy*, 6 Or. 436.
- On appeal, execution may be recalled by the Circuit Court when an undertaking for stay of proceedings has been filed: *Bentley v. Jones*, 8 Or. 47.
- No paper or evidence not offered in the court below can be regarded on the appeal from order recalling execution: *Id.*
- Recitals in record of appearance cannot be impeached by affidavit on appeal: *Cauthorn v. King*, 8 Or. 138.
- On appeal from Justice's Court, where an oral reply to a counterclaim had been made, Circuit Court may allow written reply raising same issues to be filed: *Rohr v. Isaacs*, 8 Or. 451.
- Service of notice must precede filing undertaking, and simply refiled latter is insufficient: *Weiss v. Jackson Co.*, 8 Or. 529.
- Rules are equally binding on court and litigants, and cannot be waived by the court: *Coyote G. & S. M. Co. v. Ruble*, 9 Or. 121.
- Petition for rehearing not filed within the time fixed by rule cannot be heard: *Id.*
- Question of the jurisdiction of the court below will not be considered on motion to dismiss: *Pencinse v. Burton*, 9 Or. 178.
- Cross-motion for leave to file good undertaking must be accompanied by a showing that the former defect was the result of excusable mistake: *Id.*
- Power of court to remand a cause and require pleadings reframed, to relieve from mistake, under the Code: *Branson v. Oregonian R'y Co.*, 10 Or. 278.
- Appeal in criminal cases, taken under chapter 23, Criminal Code (page 819, Hill's A. L.), may be heard at same term: *State v. Bovee*, 11 Or. 57.
- On remanding with leave to amend, Supreme Court cannot prescribe the nature and extent of the amendments: *Branson v. Oregonian R'y Co.*, 11 Or. 161.
- On filing an amended answer, all former ones, and demurrers and motions relating thereto, are abandoned,

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and cease to be part of the record reviewable on appeal: *Wells v. Applegate*, 12 Or. 208.

In equity, upon an appeal from a part of a decree, the appellate court is confined to a trial *de novo* upon the part appealed from: *Shook v. Colohan*, 12 Or. 239.

Where in an action at law there is error resulting in injury, and the judgment can be segregated, on remission of the erroneous portion, the judgment may be affirmed as to the balance: *Mackey v. Olssen*, 12 Or. 429.

Circuit Court cannot by rule require service of copy of undertaking on appeal from Justice's Court to be made on opposite party on seeking to perfect appeal: *Hosford v. Logus*, 13 Or. 130.

Motion to dismiss appeal not specifically indicating the defect objected to, it is not too late to apply to substitute new undertaking after motion comes on for hearing: *Id.*

Except for abandonment of appeal, damages will not be allowed, unless it clearly appears the appeal was for purpose of delay: *Nelson v. Oregon R'y etc. Co.*, 13 Or. 141.

Statute must be strictly pursued, or Circuit Court gains no jurisdiction on appeal: *Steel v. Rees*, 13 Or. 428.

Respondent cannot perfect the appeal from Justice's Court himself, by taking up and filing the transcript, and if he does, the action of the Circuit Court thereon is a nullity: *Id.*

The clerk should certify both undertakings where counter-undertaking has been given: *Ah Lep v. Gong Choy*, 13 Or. 429.

The nature of judgment to be entered on appeal where counter-undertaking has been given: *Id.*

Whether Supreme Court has power to recall or change mandate after sent below, *quære*: *Id.*

Legal propositions decided on a former appeal are the law of the case, and the former decision thereon will not be retried: *Powell v. D. S. & G. R. R. Co.*, 14 Or. 22.

But where new facts appear, requiring application of a different rule of law, the law of the case does not apply to such: *Bloomfield v. Buchanan*, 14 Or. 181.

Upon appeal from a judgment overruling a demurrer,

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appellate court will not hear application for leave to plead over: *Powell v. D. S. & G. R. R. Co.*, 14 Or. 22.

Such application must be made to the trial court in the first instance, and its decision will be reviewed only upon abuse of discretion: *Id.*

Amendment of 1885 respecting taking of testimony and appeals in equity cases (sec. 397, Hill's A. L.) applies to ordinary suits only, and not to special and collateral proceedings: *Martin v. Martin*, 14 Or. 165.

The effect of this amendment is to repeal sections allowing taking of depositions, and the employment of shorthand reporter in equity cases: *Marks & Co. v. Crow*, 14 Or. 382.

And it seems such amendment leaves no provision for depositions *de bene esse*, except reference first be had: *Id.*

But an appeal in a case tried before an amendment took effect is governed by the law as it previously stood: *Id.*

On failure of plaintiff to file transcript, the defendant in error may dismiss for want of transcript, or secure a transcript and have the judgment affirmed or reversed: *Roberts and Hoyt v. Tucker*, 1 W. T. 179; *Roberts and Miner v. Bush*, 1 W. T. 181.

Where record was destroyed in justice's office by fire, after appeal, but before transcript was certified in the upper court, plaintiffs in error are entitled to have their cause docketed District Court to supply the missing records: *Mullen v. Mullen*, 1 W. T. 192.

Justice's Court was not the proper court to supply the destroyed records in such case: *Id.*

Motion to strike out a motion will not be allowed: *Mann v. Young*, 1 W. T. 454.

Encumbrance of the record with superfluous matter should be punished by the imposition of costs: *King Co. v. Collins and Condon*, 1 W. T. 469.

All the facts of a case being before a Supreme Court on appeal, it may render such judgment as the District Court should have rendered: *Willey v. Morrow*, 1 W. T. 474.

When judgment is affirmed as to one of the appellees, he is entitled to recover costs against the appellant, but not against the sureties of the latter: *Id.*

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When the defendant appears in the appellate court and files a joinder of error, although the same is not contemplated by the statutes, it will operate as a general appearance: *Schwabacher v. Wells*, 1 W. T. 506.

Defendant by waiving service of the motion to perfect the transcript, without protestation, has entered general appearance: *Yesler v. Oglesbee*, 1 W. T. 604.

What is a "more favorable judgment" on appeal from a Justice's Court entitling the appellant to costs: *Baxter & Co. v. Scotland and Jensen*, 2 W. T. 86.

Where service of notice of appeal has been had upon the clerk, upon proper application the Supreme Court will permit a return to be made showing the fact of service, after the rendition of judgment upon the assumption of due service: *Blinn v. Crosby*, 2 W. T. 109.

Where, through any circumstances beyond appellant's control, omission or tardiness in filing transcript has happened, provision is made in section 460 of the Code for his relief, and in section 461 provision is likewise made for the rights of the appellee: *Crawford and Harrington v. Haller*, 2 W. T. 161.

The striking out of the evidence in a cause does not oust the jurisdiction of the Supreme Court, although it may destroy the efficiency of an appeal: *Meeker v. Gardella*, 2 W. T. 355.

Penalty inflicted by the court for non-compliance with rule 9, respecting indorsements upon briefs, and failing to set forth the names of the parties to cases cited: *Carroll v. Anderson*, 2 W. T. 366.

A party, by calling attention in his brief to jurisdictional defects in an appeal, and warning his adversary that at the proper time he would move to dismiss, does not thereby appear generally and waive the defect: *Wilson v. Wald and Campbell*, 2 W. T. 376.

Omission in the record having been brought to the attention of the party, and he taking no steps to correct the same, he will not, after the hearing, be allowed to correct the fault: *Sayward v. Guye*, 2 W. T. 420.

Notice under the act of 1883, in a settlement of the statement of facts to be used on appeal, need not be accompanied either with the original or a copy of the



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statement of facts sought to be settled: *P. S. I. Co. v. Worthington*, 2 W. T. 472.

Proper practice would be to lodge the proposed statement of facts, with notice of the settlement thereof in accordance with the act of 1883, with the clerk of the court for the inspection of the opposite party: *Id.*

Where objection to a statement of facts was first made on the argument of the cause as not being properly certified, the court grant reasonable time in which to authenticate such statement: *Id.*

**11. ERRORS AND QUESTIONS CONSIDERED.**

Court will be bound by the record: *Thompson v. Backenstos*, 1 Or. 17; *O'Kelly v. Territory*, 1 Or. 51; *Hoxie v. Hodges*, 1 Or. 251; *State v. Ducker*, 8 Or. 394.

Without bill of exceptions, none except errors of record noticed: *Scott v. Cook*, 1 Or. 25; *Taylor v. Patterson & Co.*, 5 Or. 121; *Oregonian R'y Co. v. Wright*, 10 Or. 162; *Newby v. Rowland*, 11 Or. 133; *State v. Drake*, 11 Or. 396; *Page & Co. v. Smith*, 13 Or. 410.

Irregularity of calling jury not regarded if appellant was not prejudiced: *Hart v. Territory*, 1 Or. 123.

Judgment will not be disturbed where it appears there was evidence to warrant the verdict, although the bill of exceptions purports to state all the evidence and does not: *Yamhill Bridge Co. v. Newby*, 1 Or. 174.

A judgment will not be reversed for error which worked no injury: *Aiken and Flavel v. Leonard and Green*, 1 Or. 224; *Garrison v. City of Portland*, 2 Or. 123; *State v. Garrard*, 5 Or. 216; *Terwilliger v. Multnomah Co.*, 6 Or. 295; *Johnson v. Shively*, 9 Or. 333; *Smith v. Cox*, 9 Or. 475; *Salmon v. Olds and King*, 9 Or. 488; *Briscoe v. Jones*, 10 Or. 63; *Heneky v. Smith*, 10 Or. 349; *Strong v. Kamm*, 13 Or. 172; *Moorhouse v. Donica*, 14 Or. 430; *Yelm Jim v. Territory*, 1 W. T. 63; *Brown Bros. & Co. v. Forest*, 1 W. T. 201; *City of Seattle v. Buzby*, 2 W. T. 25.

No error to refuse to instruct on point to which there was no evidence: *Latshaw v. Territory of Oregon*, 1 Or. 141; *State v. Glass*, 5 Or. 73; *Glaze v. Whitley*, 5 Or. 165; *State v. Brown*, 7 Or. 186; *Brown Bros. & Co. v. Forest*, 1 W. T. 201.

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When witness gives his opinion and understanding of conversation, though it is error to admit the evidence, if his conclusion is correct, there is no prejudice, and the judgment will not be reversed: *Aiken and Flavel v. Leonard and Green*, 1 Or. 224.

The exercise by the District Court of its discretionary power to allow defense after a default in Justice's Court will not be reviewed: *Crandall v. Piette and Davidson*, 1 Or. 226.

Rejection of cumulative evidence, which there is no ground for believing would have changed the result, is no error: *Jackson v. Sharff and Hill*, 1 Or. 246.

Error in sustaining demurrer is waived by pleading over: *Huffman v. McDaniel*, 1 Or. 259; *Wells v. Applegate*, 12 Or. 208; *Ward v. Moorey*, 1 W. T. 104.

The granting or overruling of a motion for a new trial cannot be alleged as error: *Bowen v. State*, 1 Or. 271; *State v. Fitzhugh*, 2 Or. 227; *State v. Wilson*, 6 Or. 428; *Hallock v. City of Portland*, 8 Or. 29; *State v. McDonald*, 8 Or. 113; *State v. Drake*, 11 Or. 396; *State v. Mackey*, 12 Or. 154; *Kearney v. Snodgrass*, 12 Or. 311; *State v. Becker*, 12 Or. 318; *Tucker v. Flouring Mills Co.*, 13 Or. 28; 1 W. T. 6; *Wassissimi v. Territory*, 1 W. T. 262.

Such order must be made a part of the bill of exceptions, to be reviewable: *Or. R'y Co. v. Wright*, 10 Or. 162; *Chung Yow v. Hop Chong*, 11 Or. 220; *State v. Drake*, 11 Or. 396.

But such order is not properly a part of the bill of exceptions: *Bowen v. State*, 1 Or. 271; *Kearney v. Snodgrass*, 12 Or. 311; *State v. Becker*, 12 Or. 318.

An abuse of discretion must be shown to make such order reviewable: *State v. Drake*, 11 Or. 396; *Tucker v. Flouring Mills Co.*, 13 Or. 28; *Page v. Rodney*, 2 W. T. 461.

Statute of limitations must be pleaded or no advantage of it can be taken on error: *Steamer Senorita v. Simonds*, 1 Or. 274.

Error must be legally excepted to at the time, or is deemed waived: *Rogue River Mining Co. v. Walker*, 1 Or. 341; *Kearney v. Snodgrass*, 12 Or. 311; *Blumberg*

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v. McNear & Co., 1 W. T. 141; Brown Bros. & Co. v. Forest, 1 W. T. 201.

Loss of material paper from judgment roll no ground reversal: Carland v. Heineborg, 2 Or. 75.

Where same evidence was obtained by calling the witnesses for defense, no material injury was suffered by not allowing defendant to ask a question on cross-examination of a witness for the prosecution: Garrison v. City of Portland, 2 Or. 123.

When bill of exceptions does not show what answer was made to question asked, it is presumed to have been competent: State v. Fitzhugh, 2 Or. 227; Monroe v. N. P. Coal Mining Co., 5 Or. 509.

Refusal to allow a question which might legally have been allowed, but which was subject to discretion of court, no error: Monroe v. N. P. Coal Mining Co., 5 Or. 509.

Disregarding variance is discretionary, and will not be reviewed: Brown v. Moore, 3 Or. 434; Henderson v. Morris, 5 Or. 24.

Exercise of discretion, except in case of abuse, will not be reviewed: Pittman v. Pittman, 3 Or. 553; Bennett v. Stephens, 8 Or. 444; Henderson v. Morris, 5 Or. 24; State v. Jackson, 9 Or. 457; State v. Drake, 11 Or. 396; Bowles v. Doble, 11 Or. 474; Adams v. Rutherford, 13 Or. 78; Page v. Rodney, 2 W. T. 461.

Abuse of discretion must appear affirmatively, and will not be presumed: *Id.*; Henderson v. Morris, 5 Or. 24.

Finding of fact by court below on trial without jury is not open to review: Fulton v. Earhart, 4 Or. 61; Hallock v. City of Portland, 8 Or. 29.

Where no motion for new trial was filed, the appellate court will proceed cautiously in setting aside a finding: Hallock v. City of Portland, 8 Or. 29.

Where there is no conflict of evidence, it is error to find contrary thereto: *Id.*

Where the record does not show that the evidence stated was all, the court presumes there was evidence to support the findings: Fulton v. Earhart, 4 Or. 61; Parker v. Monteith, 7 Or. 277.

Error not appearing affirmatively in the record, it is not presumed: Thompson v. Uglow, 4 Or. 369; Henderson

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v. Morris, 5 Or. 24; Dolph v. Barney, 5 Or. 192; Richards v. Fanning, 5 Or. 356; Monroe v. N. P. Coal Mining Co., 5 Or. 509; Parker v. Monteith, 7 Or. 277; Lahey v. Knott, 8 Or. 198; State v. Ducker, 8 Or. 394; Ladd and Bush v. Sears, 9 Or. 244; Tenny and McKenzie v. Mulvaney and Bemis, 9 Or. 405; Long and Spaur v. Lander, 10 Or. 175; State v. Lee Yan Yan, 10 Or. 365; Newby v. Rowland, 11 Or. 133; Tucker v. Flouring Mills Co., 13 Or. 28; Danvers v. Durkin, 14 Or. 37.

Allowance of amendment discretionary; surprise no ground for review unless shown by the record: Henderson v. Morris, 5 Or. 24.

In a proceeding in nature of *scire facias*, defense of *nul tiel record* is not available in the appellate court, and the presumption is, that the court below decided correctly on inspecting the record: McCracken v. Swartz, 5 Or. 62.

Refusal to set aside default and allow answer is discretionary, and not reviewable in absence of abuse: White v. Northwest Stage Co., 5 Or. 99; Bailey v. Williams, 6 Or. 71.

No error to refuse instruction on abstract propositions or hypothetical questions not involved in the case: Shattuck v. Smith, 5 Or. 125; Espy v. Fenton, 5 Or. 423; State v. Brown, 7 Or. 186; Rohr v. Isaacs, 8 Or. 451; Yelm Jim v. Territory, 1 W. T. 63; Schmieg v. Wold, 1 W. T. 472.

On appeal from decision in a proceeding for leave to issue execution on dormant judgment, no evidence will be considered unless contained in the judgment roll: Ladd v. Higley, 5 Or. 296.

Finding of fact by court below in equity cases is not conclusive on appeal; trial *de novo* on transcript and evidence will be had in the Supreme Court: Whitley v. Murphy, 5 Or. 353; O'Leary v. Fargher, 11 Or. 225, overruling Fahie v. Lindsay, 8 Or. 474.

Error in overruling demurrer, when waived by answering over, cannot be assigned as error: Richards v. Fanning, 5 Or. 356; Olds v. Cary, 13 Or. 362.

Where the record does not show the applicability of an



**Appeal and Error** (continued).

instruction asked and refused, it is presumed improper: *Id.*; *City of Seattle v. Busby*, 2 W. T. 25.

Findings, if not sufficient, must be embodied in bill of exceptions, after request made to the trial court for further and more specific findings: *Luse v. Isthmus Transit R'y Co.*, 6 Or. 125.

Error to submit a question of fact to the jury on which there is no evidence: *Morris v. Perkins*, 6 Or. 350; *Hayden v. Long*, 8 Or. 244; *Marx v. Schwartz*, 14 Or. 177; *Breon v. Henkle*, 14 Or. 494; *Glenn v. Savage*, 14 Or. 567.

Except want of jurisdiction and insufficiency of the complaint, no errors but those alleged in the notice of appeal will be considered: *McKay v. Freeman*, 6 Or. 453; *State v. McKinnon*, 8 Or. 487; *Weissman v. Russell*, 10 Or. 73.

Error to exclude testimony of witness, present during the examination of other witnesses contrary to the order of the court, unless it appears the party was in complicity with him: *Hubbard v. Hubbard*, 7 Or. 42.

Refusal to give special instructions substantially included in the general charge, no error: *State v. Brown*, 7 Or. 186.

In equity cases, on appeal, verdict of a jury on controverted questions is not to be disregarded unless clearly erroneous: *De Lashmutt v. Everson*, 7 Or. 212; *Swegle v. Wells*, 7 Or. 222.

Objection that the judge was not authorized to sit cannot be heard, unless it was made in the trial court: *State v. Whitney*, 7 Or. 386.

That an attorney assisting the prosecution was present before the grand jury, no ground for reversal: *State v. Whitney*, 7 Or. 386; *State v. Justus*, 11 Or. 178.

Omission to instruct on matter pertinent is no error, unless the attention of the court is called to it at the time: *Page v. Finley*, 8 Or. 45; *Hurst v. Burnside*, 12 Or. 520.

Bill of exceptions must show all evidence adduced on challenge to a juror for actual bias, to be considered on

**Appeal and Error** (continued).

appeal: *State v. Tom*, 8 Or. 177; *Hayden v. Long*, 8 Or. 244; *McAllister v. Territory*, 1 W. T. 360.

Discretion of trial court to admit evidence on promise of attorney to connect the same and make it admissible subsequently, is not reviewable: *Bennett v. Stephens*, 8 Or. 444.

The question on trial for contempt, or rule to show cause, is of fact merely, and will not be reviewed except for errors of law or want of jurisdiction: *State v. McKinnon*, 8 Or. 487.

It is error for judge in vacation to hear and determine a case of contempt of court committed in term time: *Id.*

Error to permit counsel, against objection, to state facts not in evidence, in argument to jury: *Tenny v. Mulvaney*, 8 Or. 513.

Objection to plaintiffs suing jointly cannot be heard for first time on appeal: *Stingle v. Nevel*, 9 Or. 62.

Specific objection to evidence waives any other objections, and no other will be considered on appeal: *Ladd and Bush v. Sears*, 9 Or. 244.

Error in submitting question to jury, that should have been determined by the court, will not avail where the verdict evidently found the fact correctly: *Johnson v. Shively*, 9 Or. 333.

Discretion to allow child to testify will not be reviewed except in case of abuse: *State v. Jackson*, 9 Or. 457.

Error in giving instruction, where the inference from the record shows that no injury was occasioned, no ground for reversal: *Salmon v. Olds and King*, 9 Or. 488; *Briscoe v. Jones*, 10 Or. 63; *Strong v. Kamm*, 13 Or. 172; *Yelm Jim v. Territory*, 1 W. T. 63; *Brown Bros. & Co. v. Forest*, 1 W. T. 201.

Objection to improper remarks made by district attorney in argument must be made at the time, and exception saved, to be available: *State v. Lee Ping Bow*, 10 Or. 27; *State v. Anderson*, 10 Or. 448; *State v. Abrams*, 11 Or. 169; *State v. Drake*, 11 Or. 396.

No error to receive verdict in criminal case in absence of defendant's counsel: *State v. Drake*, 11 Or. 396.

Findings of referee, not objected to below, will not be

**Appeal and Error** (continued).

- reviewed on appeal: *State v. Grover, Chadwick, and Fleischner*, 10 Or. 66.
- Testimony of husband against wife as to matters communicated during marriage, though incompetent, is presumed given with consent of wife, where record is silent: *Long and Spaur v. Lander*, 10 Or. 175.
- Error appearing affirmatively, injury is presumed: *Inverarity v. Stowell*, 10 Or. 261.
- Bill of exceptions not purporting to give all the evidence or instructions, error is not presumed in giving or refusing instructions: *State v. Lee Yan Yan*, 10 Or. 365; *Brown Bros. & Co. v. Forest*, 1 W. T. 201; *Thompson v. Territory*, 1 W. T. 547; *Or. R. & N. Co. v. Gallisher*, 2 W. T. 70.
- Instruction as to burden of proof held to apply to the proper issues only, though general in terms, where not objected to on that ground at the time: *Rogers v. Wallace*, 10 Or. 387.
- Instructions as to effect of written contract are to be reviewed by examination of the terms of the contract, not as legal propositions: *Id.*
- Where there are several defenses pleaded, some of which are bad, it will not be presumed that evidence or instructions were given relating to the bad, where the record is silent: *Newby v. Rowland*, 11 Or. 133.
- Slight variance not considered; it is presumed that amendment was allowed on the trial: *Davidson v. O. & C. R. R. Co.*, 11 Or. 136.
- No errors not based on judicial action of the court below can be considered: *State v. Abrams*, 11 Or. 169.
- Error in not striking out matter on motion, no ground for reversal where the verdict was general and injury is not apparent: *Krewson v. Purdom*, 11 Or. 266.
- Findings of referee in proceedings supplemental to execution will not be reviewed, unless there is no evidence to sustain them: *Williams v. Gallick*, 11 Or. 337.
- Failure to find an immaterial issue of fraud is no error: *Id.*
- Error to instruct jury to disregard "mere slight variances" between witnesses as affecting their credit: *State v. Swayze*, 11 Or. 357.
- Referee's report in action at law is not properly a part of

**Appeal and Error** (continued).

the transcript, and cannot be considered: *Osborn v. Graves*, 11 Or. 526.

Mere uncertainty in pleadings not objected to by motion or demurrer will not be considered on appeal: *Id.*

Error in overruling motion for nonsuit is cured by evidence in defense which supplies the defect: *Bennett v. N. P. Ex. Co.*, 12 Or. 49.

In criminal cases, injury is presumed where the error consists in the infraction of a constitutional guaranty: *State v. Lurch*, 12 Or. 99.

The admission of dying declarations is discretionary and cannot be reviewed: *State v. Saunders*, 14 Or. 300; *Hartigan v. Territory*, 1 W. T. 447.

Where the questions between the parties are chiefly of fact determined by the verdict, there should be no reversal, unless the error is clearly shown: *Hurst v. Burnside*, 12 Or. 520.

Instruction assuming a fact which should be left to the jury is error: *Yarnberg v. Watson*, 13 Or. 11.

Variance not appearing affirmatively to have worked injury, no ground for reversal: *Tucker v. Flouring Mills Co.*, 13 Or. 28.

Admission of evidence of injury by overflowing plaintiff's land, prior to time alleged in the complaint, is not error, and it is presumed that the jury were instructed not to consider the same: *Id.*

"Within the last two years" in an instruction is presumed to refer to the two years prior to the commencement of the action: *Id.*

Verdict for excessive damages is no ground for reversal on appeal; refusal of trial court to set it aside is not reviewable: *Nelson v. Oregon R'y etc. Co.*, 13 Or. 141.

Error affecting rights of defendant in criminal case, however slight, is ground for reversal: *State v. O'Neil*, 13 Or. 183.

Appellant in Supreme Court may take advantage of error committed against him in the court below, notwithstanding defects in his own pleadings, unless such defects would be ground for arrest of judgment if rendered in his favor: *Minter v. Durham*, 13 Or. 470.

Where two contracts are in evidence, a refusal to give a



**Appeal and Error** (continued).

- general instruction, which applies to but one of them the correct rule, is not error: *Krewson & Co. v. Purdom*, 13 Or. 563.
- Supreme Court is confined to consideration of questions already determined in the court below, and cannot pass upon matters in advance thereof: *Fisk v. Henarie*, 14 Or. 29.
- Refusal to submit special questions to jury for their finding thereon is discretionary and not reviewable: *Burkhardt v. Howard*, 14 Or. 59.
- Error in allowing motion to strike out an answer is waived by filing amended answer: *Hexter v. Schneider*, 14 Or. 184.
- Objection to the sufficiency of service of notice of appeal from Justice's Court, when not made in the Circuit Court, will not be heard in the Supreme Court: *Lancaster v. McDonald*, 14 Or. 264.
- Decree concerning property rights in a divorce case, not supported by the allegations and proofs, will be reversed: *Bender v. Bender*, 14 Or. 353.
- Instruction outside the issues, but in favor of the party complaining of it, is no ground for reversal: *Moorhouse v. Donaca*, 14 Or. 430.
- Defect in the record not materially affecting the merits, not sufficient cause for setting aside judgment: *Nesqually Mill Co. v. Taylor*, 1 W. T. 1.
- Trial of prisoner without entry of his plea, ground for reversing judgment: *Palmer v. United States*, 1 W. T. 5.
- Findings of fact by court below, in a case tried without jury, stand on appeal as the verdict of a jury: *Madison v. Madison*, 1 W. T. 60; *Wiley v. Morrow*, 1 W. T. 474; *Tierney v. Tierney*, 1 W. T. 568; *Baker and Hamilton v. McAllister*, 2 W. T. 48.
- Court will not review erroneous instructions upon mere abstract principles of law: *Yelm Jim v. Territory*, 1 W. T. 63.
- Motion in arrest of judgment made, and afterwards waived in the lower court, cannot be considered on appeal: *Freany v. Territory*, 1 W. T. 71.
- Refusal of District Court to allow amendment on appeal from Justice's Court will not be reviewed unless the pur-

**Appeal and Error** (continued).

pose of the amendment be made clearly to appear: *Newberg and Abrams v. Farmer*, 1 W. T. 182.

Refusal of District Court to docket a cause on appeal from Justice's Court, where the records below were destroyed, and allow a record to be supplied, constitutes a final judgment, reviewable on error: *Mullen v. Mullen*, 1 W. T. 192.

All the instructions should be before the appellate court in order to determine whether particular instructions complained of were erroneous: *Brown Bros. & Co. v. Forest*, 1 W. T. 201; *Or. R. & N. Co. v. Galliher*, 2 W. T. 70.

Findings of fact by the judge answer to a special verdict, while the conclusions of law are in the nature of a general verdict: *Wiley v. Morrow*, 1 W. T. 474.

Findings of lower court in divorce case stand as the verdict of the jury; not to be set aside unless manifestly contrary to the evidence: *Tierney v. Tierney*, 1 W. T. 568.

Findings of fact by the lower court, like a verdict, will not be set aside if any evidence appears upon which they may properly be sustained: *Tierney v. Tierney*, 1 W. T. 568; *Baker and Hamilton v. McAllister*, 2 W. T. 48.

Instruction must be shown to have been pertinent and consistent with the evidence and law, and the refusal to give must have worked injury to the party asking it, for refusal to be considered on appeal: *City of Seattle v. Buzby*, 2 W. T. 25.

No error to refuse instruction in the language requested when such failure has not been to the injury of the party requesting: *Id.*

On an appeal in equity, objection to the sufficiency of the complaint may be heard, and the evidence in the cause need not be certified to the Supreme Court: *Seattle & W. W. R. R. Co. v. Ah Kow*, 2 W. T. 36.

So long as there is evidence to support a finding made by the trial court, it will not be reversed, though the Supreme Court would make a different finding on the question if presented anew: *Baker and Hamilton v. McAllister*, 2 W. T. 48.

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Exception to sustaining a demurrer to the complaint is not waived by filing an amended complaint: *Wood v. Mastick*, 2 W. T. 64.

Where the transcript does not show otherwise, it is presumed that other parts of the charge so modified the instruction complained of as to free it from objection: *Or. R. & N. Co. v. Galliher*, 2 W. T. 70.

Trial court having committed error in admitting certain evidence in its charge to the jury withdrew such evidence from their consideration, and the error was thereby cured: *P. S. I. Co. v. Worthington*, 2 W. T. 472.

**Appearance.** See Appeal and Error; Attorneys; Practice.

**Application of Payments.** See Payment.

**Appropriations.** See Water and Watercourses.

Must be special appropriation to pay warrants on state treasury, unless claim is authorized to be paid out of general fund: *Brown v. Fleischner*, 4 Or. 132.

Warrants for expenses under centennial commission act cannot be paid out of appropriation for general fund: *Simon v. Brown*, 5 Or. 286.

Specific appropriation to pay an existing deficiency may be properly embraced in a general appropriation bill under section 7, article 9, of the constitution: *Burch v. Earhart*, 7 Or. 58.

Special tax not necessary under section 6, article 9, of the constitution, when there is sufficient funds from existing taxation to pay deficiency and current expenses: *Id.*

**Argument.** See Attorneys; Criminal Law; Practice.

**Arraignment.** See Criminal Law.

**Arbitration and Award.**

Award of referees is void after authority to act has expired by failure to report in time: *Hanner, Jennings, & Co. v. Coffin*, 1 Or. 99.

Agreement to arbitrate, unexecuted, is no defense to action on the contract: *Savage v. Glenn*, 10 Or. 440.

Award which does not determine all the issues is not binding: *Belt v. Poppleton*, 11 Or. 201.

Subsequent promise by person against whom it is sought to be enforced operates as a ratification: *Id.*

Matters arbitrated, which were not included in the issues submitted to the arbitrators, but submitted without objection, are conclusively settled by the award: *Id.*

**Arbitration and Award** (continued).

When award substantially complies with the law it should not be disturbed for mere technical defects: *Bachelor v. Wallace*, 1 W. T. 107.

When terms of submission authorize majority of three arbitrators to make a finding, it is sufficient if two make the finding: *Id.*

Court will presume in such case that all acted, when it appears that all were sworn, though but two sign: *Id.*

**Arrest.** See Malicious Prosecution.

Private person may arrest one guilty of assault with dangerous weapon, though not seeing the offense committed: *Lander v. Miles*, 3 Or. 35.

In justification of such arrest, a preponderance of evidence of the guilt of the arrested person sufficient: *Id.*

Firing a gun in order to secure arrest is justifiable only when necessary: *Id.*

All jurisdictional facts need not be recited in warrant of arrest: *Norman v. Zieber*, 3 Or. 197.

In civil cases, jurisdiction depends on the affidavit, which must be sufficient, or the arrest is void: *Id.*

The power to arrest in civil cases under the constitution and the statute is limited to cases of fraud designated in statute: *Id.*

Absconding debtor defined: *Id.*

Sheriff, in section 110, Civil Code (sec. 112, Hill's A. L.) relating to arrests in civil cases, includes constables: *Hume v. Norris*, 5 Or. 478.

It is the duty of a constable on redelivery of person arrested, to his custody, by his sureties, to acknowledge the return of such person by certificate indorsed on a certified copy of the undertaking of bail: *Id.*

Prisoner may be searched, and property that would aid his escape be taken from him: *Dahms v. Sears*, 13 Or. 47.

But such property is in custody of the law, and is not liable to attachment: *Id.*

**Assault.** See Admiralty; Assault and Battery; Homicide.

Assault with dangerous weapon is felony, and a private person may arrest: *Lander v. Miles*, 3 Or. 35.

Indictment for assault with intent to kill is sufficient if in statutory language, if not demurred to: *State v. Doty*, 5 Or. 491.



**Assault** (continued).

Evidence of application previously made by prisoner to have a justice put assaulted party under bond to keep the peace, not admissible as justification: *Id.*

Indictment for assaulting an officer, under section 677, Criminal Code (sec. 1900, Hill's A. L.), must allege that defendant knew the person assaulted to be such officer: *State v. Smith*, 11 Or. 205.

Assault with dangerous weapon cannot be punished by a city, under a power in its charter to prevent and restrain riot, noise, disturbance, etc., on the streets: *Walsh v. City of Union*, 13 Or. 589.

**Assault and Battery.** See Admiralty; Assault.

Circuit and Justice's Courts have concurrent jurisdiction of the offense: *State v. Sly*, 4 Or. 277.

Conviction before recorder for fighting and disturbing peace of city, not a bar to prosecution in Circuit Court for assault and battery: *Id.*

In an action for assault and battery on an infant by one having custody of him, evidence of the general treatment of the infant by the defendant is admissible to show or to rebut malice: *Smith v. Harris*, 7 Or. 76.

Exemplary damages may be awarded where malice is shown: *Heneky v. Smith*, 10 Or. 349.

Evidence of social rank and pecuniary circumstances is admissible in such case: *Id.*

Acquittal of assault and battery is no bar to subsequent prosecution for kidnaping: *State v. Stewart*, 11 Or. 52; *S. C.*, 11 Or. 238.

Justification, as a defense, must be specially pleaded in an action for damages by assault and battery: *Konigsberger v. Harvey*, 12 Or. 286.

**Assessment.** See Corporations; Municipal Corporations; Taxation.

**Assessors.** See Taxation.

County assessors are not entitled to mileage: *Taylor v. Umatilla Co.*, 6 Or. 401.

**Assignments.** See Assignment for Benefit of Creditors; Trusts and Trustees; Warehousemen.

Right to file mechanic's lien is not assignable; otherwise, the right to foreclose after the lien is perfected: *Brown v. Harper*, 4 Or. 89.

**Assignments (continued).**

- Right of obligee of a bond against engaging in a certain business cannot be assigned before breach: *Hillman v. Shannahan and Wadhams*, 4 Or. 163.
- Assignment of mortgage is usually affected by a transfer of the note or bond: *Roberts v. Sutherlin*, 4 Or. 219.
- Of judgment, does not carry a right of action on undertaking given in Justice's Court for costs: *Dray v. Mayer*, 5 Or. 185.
- Suit by assignee of one obligee of bond is not a bar to a suit for specific performance after assignment to him of the rights of the other obligees: *Knott v. Stephens*, 5 Or. 235.
- Assignment of the costs and disbursements to be recovered, to an attorney, before judgment but after verdict, is valid, and will prevent a right to set-off attaching, if such right would otherwise exist: *Ladd and Bush v. McFadden and Ferguson*, 9 Or. 180.
- Assignment of warehouse receipt transfers the property without better title than assignor had: *Solomon v. Bushnell*, 11 Or. 277.
- Right to assign ferry franchise and right of private parties to object to the validity of such assignment: *Montgomery v. Multnomah R'y Co.*, 11 Or. 344; *Hackett v. Wilson*, 12 Or. 25; *Hackett v. Multnomah R'y Co.*, 12 Or. 124.
- Claim arising from tort affecting the estate of a person may be assigned, but not one arising out of injury to his person: *Dahms v. Sears*, 13 Or. 47.
- Assignee of a distributive share of an estate may notify the executor of the assignment to him from the devisee for purpose of requiring payment to him: *Harrington v. La Roque*, 13 Or. 344.
- But cannot take a decree in the order of distribution requiring executor to pay to him; and such decree is void on collateral attack: *Id.*
- Assignments of rights of various parties under a contract for leasing a band of sheep examined: *Beezley v. Crossen*, 14 Or. 473.
- Right of adverse party to be examined as a witness when the "assignor of a thing in action" has been so examined, under statute: *Glasford and Shield v. Baker and Cain*, 1 W. T. 224.

**Assignments (continued).**

Whoever transfers an estate is an assignor, whether the estate be real or personal property, assigned by deed or parol: *Id.*

So a vendor in a quitclaim deed is an assignor: *Id.*

Vendor by quitclaim deed of a mere equitable right to take water from the land of another is an assignor: *Id.*

Such quitclaim deed amounts to a mere executory contract to convey, and the vendor is an assignor of a right resting in contract within the statute: *Id.*

Assignee in such case takes no better right than assignor had, and which is a mere demand for possession and enjoyment of the water right: *Id.*

Transfer of contract to furnish supplies to the United States, being forbidden by law, is void: *Turnbull and Jones v. Farnsworth*, 1 W. T. 444.

No action can be maintained on notes given in payment for such assignment: *Id.*

Court will leave all parties to such transaction where it finds them: *Id.*

**Assignment for Benefit of Creditors.** See *Insolvency*.

Assignment preferring unsecured creditors not presumed fraudulent: *Kruse v. Prindle*, 8 Or. 158.

Burden is on person attacking to show fraud participated in by assignor and assignee: *Id.*

Assignment *ipso facto* dissolves attachment from the date thereof, and the assignee need not intervene: *Tichenor v. Coggins*, 8 Or. 270.

Assignee is not a purchaser in good faith, and is chargeable with equities that could be sustained against the creditors or his assignor: *Jacobs Bros. & Co. v. Ervin*, 9 Or. 52.

Assignee cannot impeach transfer made fraudulently by assignor before assignment, valid as to assignor—but fraudulent as to creditors: *Id.*

Has power to resist the enforcement of a lien on property in his hands fraudulent as to creditors, though valid as to assignor: *Id.*

Assignment by one formerly a partner of, and now owning stock of, firm dissolved by consent, carries such goods as his other individual assets, and not as partnership property: *McKinney v. Baker*, 9 Or. 74.

**Assignment for Benefit of Creditors** (continued).

Recording deed of assignment not essential to validity of assignment where possession accompanies the conveyance of personal property: *Dawson v. Crossen*, 10 Or. 41.

Failure of assignee to file an inventory for record does not render assignment void: *Id.*

Parol transfer of goods to arrive as security for indebtedness and subsequent advances is good as against assignee, though pledgee does not gain possession until after assignment: *Gammons v. Holman*, 11 Or. 284.

Assignee takes only such rights as his assignor held at date of assignment: *Id.*

Circuit Court exercising supervisory control under act of 1878 (chap. 28, Hill's A. L.) exercises a statutory power, and its jurisdiction therein is inferior and limited: *In re Goldsmith*, 12 Or. 414.

No appeal lies from an order upon a petition for removal of an assignee: *Id.*

To set aside a general assignment as fraudulent at creditors' suit, creditor must first obtain a lien by judgment or otherwise on the property: *Dawson v. Coffey*, 12 Or. 513.

Assignee under a fraudulent assignment may be garnished: *Id.*

When equity may be resorted to by creditor to prevent fraud and misapplication of funds: *Id.*

Assignee takes the legal title of the property assigned: *Id.*

Agreement by assignees that one of their number shall make the necessary purchases and sales, and receive a commission thereon, is void: *Kinney v. Heatley*, 13 Or. 35.

Assignor suing assignees for an accounting must tender balance due the creditors, or he is not entitled to costs: *Id.*

But in such case, if the assignees have sufficient property to satisfy all creditors, they are not entitled to attorneys' fees beyond the statutory costs: *Id.*

Mortgagee of chattels may maintain trover against assignee for conversion of the property: *Case T. M. Co. v. Campbell*, 14 Or. 460.

Assignee is entitled to possession of chattels mortgaged,



**Assignment for Benefit of Creditors** (continued).

but cannot dispose of them contrary to the stipulations of the mortgage: *Id.*

**Associations.** See Voluntary Associations.

**Assumpsit.** See Contracts; Evidence; Money Had and Received.

Is an action on the case: *Baldro v. Tolmie*, 1 Or. 176.

Note made on Sunday is void, but *assumpsit* lies on subsequent promise to pay: *Smith v. Case*, 2 Or. 190.

In action for an agreed price, proof of value and circumstances, when admissible: *Brown v. Cahalin*, 3 Or. 45.

Value of services performed under a contract not completed, where compliance becomes impracticable, may be recovered where contract was not voluntarily abandoned: *Steeple v. Newton*, 7 Or. 110; *Tribou v. Strowbridge*, 7 Or. 156; *Todd v. Huntington*, 13 Or. 9.

Where goods are sold on credit, the vendee to furnish secured notes in payment, and he fails to do so, action for the price will lie before the term of credit expires: *Wheeler v. Harrah*, 14 Or. 325.

No action lies to recover for an act voluntarily done for the benefit of another, without his request, unless he subsequently promises to pay for it: *Rohr v. Baker*, 13 Or. 350; *Glenn v. Savage*, 14 Or. 567.

Nor to recover for money voluntarily paid upon the debt of another without his request: *Williams & Co. v. Miller & Co.*, 1 W. T. 88.

Common-law count of *indebitatus assumpsit* will, under the Code, support proof of special or implied *assumpsit*: *Seattle & W. R. R. Co. v. Ah Kow*, 2 W. T. 36.

**Attachments.** See Garnishment.

Attachment act of 1849 is not repealed by that of 1857, except so far as they conflict: *Winter and Lattimer v. Norton*, 1 Or. 42.

Appearance of defendant is not equivalent to surrendering himself into custody to release an attachment under the attachment law of 1851: *Norton v. Winter*, 1 Or. 97.

Bill of sale, unaccompanied by delivery, void as against attaching creditors: *Monroe v. Hussey and Burbank*, 1 Or. 188.

Property attached and returned on giving a redelivery bond cannot be reattached on other claims: *Duncan v. Thomas*, 1 Or. 314.

**Attachments (continued).**

Seizure by sheriff after accepting such bond is tantamount to redelivery, and releases bond: *Id.*

Attachment issued on insufficient affidavit will protect officer serving, but not plaintiff or the justice issuing the same: *White v. Thompson*, 3 Or. 115.

Sufficiency of sureties cannot be inquired of on *habeas corpus* proceedings: *Norman v. Zieber*, 3 Or. 197.

Sheriff does not acquire special ownership in real property by attachment: *State v. Cornelius*, 5 Or. 46.

The only effect of such levy is to create lien in favor of attaching creditor: *Id.*

The officer must take personal property in his custody, or he acquires no special property therein: *Schneider v. Sears*, 13 Or. 69.

Subsequent attachment and sale of the property by the same person may be shown by him in mitigation of damages when he is sued for seizing them under a void attachment: *Morrison v. Crawford*, 7 Or. 472.

Assignment, from its date, *proprio vigore* dissolves attachment, and assignee need not intervene: *Tichenor v. Cogins*, 8 Or. 270.

Affidavit on attachment need only state the ultimate facts showing the indebtedness in the language of the statute: *Crawford v. Roberts*, 8 Or. 324.

Attachment lien, without judgment or execution, is sufficient to sustain bill, in the nature of a creditor's bill, in equity, to set aside a fraudulent conveyance or decree and sale thereunder: *Bremer & Co. v. Fleckenstein and Mayer*, 9 Or. 266; *Dawson v. Sims*, 14 Or. 561.

Statute requiring the judgment to order the attached property sold does not apply where the property has already been sold under prior lien, and the proceeds only remain: *Dawson v. Sims*, 14 Or. 561.

Attaching creditor stands in all respects as a *bona fide* purchaser as to notice of unrecorded deed: *Boehreinger v. Creighton*, 10 Or. 42.

So as to personalty, where there has been no delivery or change of possession passing the property: *Gill & Co. v. Frank*, 12 Or. 507.

Order for sale of property attached, made under section

**Attachments** (continued).

- 155 of the Code, as amended, does not bar action for its recovery, if exempt, and duly claimed as such at the time: *Berry v. Charlton*, 10 Or. 362.
- Attaching creditor gains no right the defendant had not: *O. R. & N. Co. v. Gates*, 10 Or. 514.
- Appeal lies from an order dissolving or refusing to dissolve attachment: *Sheppard v. Yocum*, 11 Or. 234; *Suffern v. Chisholm*, 1 W. T. 486.
- Attachment cannot issue in an action for tort: *Suffern v. Chisholm*, 1 W. T. 486; *Suksdorff v. Bigham*, 13 Or. 369.
- Order of sale of attached property, under act of 1878, terminates proceedings against garnishee in pending garnishment proceedings, except as a means of discovery: *Carter, Rice, & Co. v. Koshland*, 12 Or. 492.
- When a debtor attempts to assign his property in fraud of creditors, a creditor may attach the same, or may garnish the assignee if delivery has been made: *Dawson v. Coffey*, 12 Or. 513.
- Money taken from the person of a prisoner by the sheriff is not subject to attachment: *Dahms v. Sears*, 13 Or. 47.
- Not sufficient to levy on a safe by posting a copy of the writ on it; must be taken in custody: *Schneider v. Sears*, 13 Or. 69.
- Attachment proceedings are statutory, and must be strictly pursued: *Id.*
- Sheriff has no power to decide that his levy is subordinate to one made by constable: *Id.*
- Must obtain directions from the court, or take indemnity bond before releasing: *Id.*
- Sheriff is entitled to necessary keeper's fees for care of attached property, which are not taxable as costs, but are a charge upon the assets: *Id.*
- Property attached cannot be ordered sold when judgment is rendered, if attachment has previously been released: *Ah Lep v. Gong Choy*, 13 Or. 205.
- No waiver of lien by not describing the attached property ordered sold in the judgment entry: *Gerdes v. Sears*, 13 Or. 358.
- Duty of officer to levy at once on receiving writ, which is

**Attachments (continued).**

fully executed by attaching sufficient property to satisfy the demand, costs, and expenses: *Id.*

Officer must return writ as soon as he levies on sufficient property: *Id.*

It is unnecessary that writ should remain in hands of officer in order to hold the property: *Id.*

Where complaint is indefinite as to whether in tort or contract, the complaint can be amended so as to sustain an attachment already issued: *Suksdorff v. Big-ham*, 13 Or. 369.

Amendment of complaint enlarging the demand does not render the attachment void, unless done fraudulently or to include a new cause of action: *Id.*

In pleading a right claimed under attachment proceedings, it is necessary to allege, generally, the making of the affidavit and giving of the undertaking: *Page & Co. v. Smith*, 13 Or. 410.

Where the contract was not "made in this state," there must be an express stipulation that it is to be "payable in this state," or attachment does not lie: *Trabant v. Rummell*, 14 Or. 17.

*Semble*, that a subsequent promise to pay in the state a contract not made or payable in the state will not support an attachment, where the suit is on the original contract: *Id.*

Where under a contract by which sheep were leased in such manner that the lessor and lessee were tenants in common, held, that the lessee had an attachable interest, though there were certain liens thereon for advances: *Beezley v. Crossen*, 14 Or. 473.

Plaintiff's attorney cannot by virtue of his employment bind plaintiff for the expense of a lock to secure the door of a building containing property attached: *Glenn v. Savage*, 14 Or. 567.

Attachment is but an auxiliary proceeding under the laws of Washington Territory: *Nesqually Mill Co. v. Taylor*, 1 W. T. 1.

Defective affidavit for attachment not cause for disturbing judgment: *Id.*

Such defective affidavit may be cured by supplemental affidavit: *Id.*



**Attachments (continued).**

Erroneous ruling on attachment will not affect a judgment on the merits: *Williams & Co. v. Miller & Co.*, 1 W. T. 88.

Defendant cannot move for dissolution of attachment until he has appeared and answered: *Rodolph v. Mayer*, 1 W. T. 133.

Where defendant has given undertaking for release of the property, and judgment goes against him, it may be entered against his sureties also to the extent of their bond: *Id.*

Complaint being improperly dismissed, attachment fails, but is restored when appeal is perfected from the erroneous decision: *Renton v. St. Louis*, 1 W. T. 215.

Transfer of the attached property in good faith during such interval is valid: *Id.*

In Washington Territory, property vested in a non-resident administrator is liable to attachment and other process: *Barlow and Shepherd v. Coggan*, 1 W. T. 257.

Order dissolving attachment is a final order from which writ of error lies: *Suffern v. Chisholm*, 1 W. T. 486.

But such order made by the judge in chambers is not an order of the court, and, being void, will not be reviewed by the Supreme Court: *Id.*

As between attaching creditor and mortgagee of a chattel, an attachment is valid, although the sureties on the attachment bond did not justify as to their financial qualifications: *Baxter v. Smith*, 2 W. T. 97.

Actual prior notice of unrecorded chattel mortgage does not give such mortgage precedence over the attachment of the creditor of the mortgagor: *Id.*

**Attorneys.** See District Attorney.

After appearance by attorney, defendant cannot make his want of means to employ an attorney an excuse for dereliction in not setting up certain facts in his answer: *Holladay v. Elliott*, 3 Or. 340.

A stipulation for reasonable attorneys' fees in a note held to mean statutory costs: *Gaston v. McLeran*, 3 Or. 389.

Payment by attorney to client on collections made prevents statute of limitations from running against client for collections retained by attorney: *Torrence v. Strong*, 4 Or. 39.

**Attorneys (continued).**

An attorney cannot change the legal effect of a notice of appeal on file by attaching proof of service: *Briney v. Starr*, 6 Or. 207.

County commissioners may employ attorney to represent the county in suits: *Taylor v. Umatilla Co.*, 6 Or. 394.

Board of school land commissioners may employ counsel to assist in prosecuting foreclosure suit, but the district attorney is entitled to his fees: *Claim of L. B. Ison*, 6 Or. 465.

It is an error to permit an attorney, in his argument to the jury against objections, to assume or state facts not proved: *Tenny v. Mulvaney*, 8 Or. 513.

Assignment of costs to, after verdict and before judgment is valid, and will prevent right of set-off attaching that otherwise might have been available: *Ladd and Bush v. McFadden and Ferguson*, 9 Or. 180.

Attorney for defendant in criminal case need not be present when verdict is received: *State v. Lee Ping Bow*, 10 Or. 27.

Remarks to jury by attorney, if improper, must be objected to and exception saved at the time: *Id.*; *State v. Abrams*, 11 Or. 169.

In the opening statement of his case to the jury, attorney may detail the particular facts, and need not be confined to a general statement of the issues in the pleadings, but the court may prevent abuse: *Long and Spaur v. Lander*, 10 Or. 175.

Power of a court of equity, where an attorney is guilty in the case of negligence or misconduct toward his client, to grant relief in a summary manner: *Branson v. Oregonian R'y Co.*, 10 Or. 278.

Mere objection and exception to improper remarks of district attorney, without requesting court to act, will not avail: *State v. Anderson*, 10 Or. 448; *State v. Abrams*, 11 Or. 169.

Attorneys are entitled to commissions on collections placed in their hands, although the debtor thereafter pays to the creditor direct: *Saubert & Co. v. Conley and Leaseure*, 10 Or. 488.

Reasonable attorney's fees may be stipulated in a note: *Peyser v. Cole*, 11 Or. 39.

**Attorneys (continued).**

Demand of payment need not be alleged in an action by attorney to recover for the reasonable value of his services: *Gibbs v. Davis*, 11 Or. 288.

Objectionable statements and arguments to jury must be set forth in a bill of exceptions, to be considered on appeal: *State v. Drake*, 11 Or. 396.

Though an offense charged against an attorney is indictable, a court need not await indictment and conviction before disbarring him: *State ex rel. McCormick v. Winton*, 11 Or. 456.

Answer to a charge against attorney, which, if verified, might subject the accused to punishment criminally, may be omitted by permission of the court: *Id.*

Denial of reasonableness of attorney's fees alleged in action on note raises an issue to be tried: *Bowles v. Doble*, 11 Or. 474.

Under existing laws, Supreme Court had no power to admit women to practice: *In re Leonard*, 12 Or. 93.

Service of order in garnishment proceedings upon attorney is insufficient, but appearance by the party and his attorney waives the defect: *Carter, Rice, & Co. v. Koshland*, 12 Or. 492.

Notice of appearance by attorney in a case is unnecessary, unless the right to appear is challenged by the other party: *Id.*

Limiting time for argument to jury to less than two hours is discretionary with the court: *Hurst v. Burnside*, 12 Or. 520.

Assignment to an attorney of a right of action to enable him to sue thereon, he stipulating for more than two thirds thereof as compensation, is champertous and void: *Dahms v. Sears*, 13 Or. 47.

Attorney may contract for percentage or contingent fee, but cannot purchase a claim for a part thereof to sue in his own name: *Id.*

Notice of appeal from Justice's Court need not be served on attorney: *Byers v. Cook*, 13 Or. 297.

Attorney in Justice's Court acts as attorney for the party, but in courts of record appears for and represents him in all written proceedings: *Id.*

When attorney's fees are recoverable as an element of

**Attorneys (continued).**

- damages in action on an injunction bond: *Olds v. Cary*, 13 Or. 362.
- Stipulation in a mortgage for twenty per cent as attorney's fees is against public policy, and will not be enforced, nor will the court in such case allow reasonable fees: *Balfour v. Davis*, 14 Or. 47.
- Board of pilot commissioners may employ an attorney to advise them in investigation of charges against a pilot: *Snow v. Reed*, 14 Or. 342.
- An attorney cannot, by virtue of his employment, bind his client for the expense of a lock to secure a building containing property attached at the client's suit: *Glenn v. Savage*, 14 Or. 567.
- Courts have power to restrain counsel, to keep them within the limits: *Leschi v. Territory*, 1 W. T. 13.
- Attorney may, by virtue of general power as attorney on the record, discontinue a suit: *Simpson v. Brown Bros. & Co.*, 1 W. T. 247.
- Right of court to refuse to hear attorney representing parties in a suit, whose interests conflict, argued, but not decided: *Id.*
- Prosecuting attorney, after making application for mandate on behalf of county, against county commissioners, cannot be permitted to represent both parties in after proceedings, though they so desired: *Clarke Co. ex rel. v. Commissioners of Clarke Co.*, 1 W. T. 250.
- Court will not allow issue to be joined where both plaintiff and defendant are represented by same attorney: *Id.*
- Professional confidence once reposed cannot be divested by expiration of the employment: *Nickels v. Griffin*, 1 W. T. 374.
- Though attorney was employed specially for a particular purpose, he cannot after its accomplishment appear on the other side in the case: *Id.*
- Lapse of time or failure to raise objection at once to his so appearing does not waive the objection: *Id.*
- Acceptance of the fruits of a decree by an attorney is acceptance by the client, and thereafter party is estopped from appealing: *Lyons v. Bain*, 1 W. T. 482.
- Receipt by attorney to clerk for money paid in satisfaction of a decree is properly a part of the record, to be certified with the other papers in the case on appeal: *Id.*



**Attorneys (continued).**

Allowance of attorney's fees for foreclosure of mechanic's lien: *Seattle & W. W. R. R. Co. v. Ah Kow*, 2 W. T. 36.  
 United States attorney, and not his assistant, must be served with notice of suing out writ of error in criminal case arising under United States laws: *Bennett v. United States*, 2 W. T. 179.

**Attorneys' Fees.** See Attorneys.

**Autrefois Convict.** See Criminal Law.

**Award.** See Arbitration and Award.

**Bail.** See Bonds and Undertakings; Habeas Corpus.

It is the duty of a constable to acknowledge the return of a defendant by his sureties in a civil action upon a certified copy of the undertaking of bail: *Hume v. Norris*, 5 Or. 478.

**Bail Bonds.** See Bonds and Undertakings.

**Bailments.** See Brokers; Innkeepers; Liens; Warehousemen.

Vendor of timber standing, sold to be delivered in logs at vendee's mill, has such title in the logs before delivery as to be able to pledge them: *Dean v. Lawham*, 7 Or. 422.

Pledgee, being one who has a claim on the logs for labor done in cutting them, has right to possession as against vendee: *Id.*

On satisfaction of his claim, the pledgee is bound to deliver possession to his pledgor: *Id.*

Parol pledge of goods to arrive, good as against assignment for the benefit of creditors subsequently made: *Gammons v. Holman*, 11 Or. 284.

Pledgor's interest in goods pledged is liable to execution: *Williams v. Gallick*, 11 Or. 337.

The pledgor holds the legal title to the property pledged, and not merely an equitable interest: *Id.*

**Banks.**

The constitution, article 11, section 1, does not prohibit establishment of banks not having the privilege of making and issuing money or credits to circulate as money: *State v. H. S. & L. A.*, 8 Or. 396.

**Bankruptcy.** See Assignment for Benefit of Creditors; Insolvency.

Creditor not made party to bankrupt proceedings can

**Bankruptcy (continued).**

subsequently impeach fraudulent conveyance made prior to such proceedings, and kept concealed from assignee: *Besser v. Joyce*, 9 Or. 310.

Proceedings of bankruptcy against mortgagor after foreclosure and sale do not affect the legal title of the property sold: *De Lashmutt v. Sellwood*, 10 Or. 319.

Resident creditor cannot attack collaterally a discharge in bankruptcy for fraud, where it is not shown that he had no knowledge or notice of the fraud at the time of the discharge: *Rosenthal v. Schneider*, 2 W. T. 144.

**Bastards.** See Parent and Child.

**Bequests.** See Legacies and Legatees; Wills.

**Bias.** See Jury and Jury Trial.

**Bill of Costs.** See Costs and Disbursements.

**Bill of Exceptions.** See Appeal and Error.

**Bill of Particulars.**

Omission by clerk to file, cannot prejudice parties' rights: *Cline v. Broy*, 1 Or. 89.

Witness may refresh his memory by, when in his own handwriting: *Williams & Co. v. Miller & Co.*, 1 W. T. 83.

**Bill of Sale.**

Unaccompanied by delivery is void as against attaching creditors: *Monroe v. Hussey and Burbank*, 1 Or. 188.

May be shown to be a chattel mortgage by parol: *Bartel v. Lope*, 6 Or. 321.

**Bill of Peace.** See Cloud on Title; Quieting Title.

**Bills and Notes.** See Answers and Defenses; Attorneys; Complaints; Interest; Joint and Several Liability; Statute of Limitations; Suretyship; Usury.

1. IN GENERAL.

2. INDORSEMENT AND TRANSFER.

3. GUARANTY AND SURETY.

4. PRESENTMENT, DEMAND, AND NOTICE.

5. PLEADING, PRACTICE, EVIDENCE, ETC.

1. IN GENERAL.

Note made on Sunday is void, but subsequent promise will support action in *assumpsit*: *Smith v. Case*, 2 Or. 190.

A non-negotiable note is not entitled to days of grace: *McMullan v. Abbott*, 1 Or. 258.

**Bills and Notes** (continued).

Forbearance, as consideration, must have been forbearance on a demand sustainable in law or equity: *O. & C. R. R. Co. v. Potter*, 5 Or. 228.

Orders drawn on corporation by itself payable to bearer are in effect its promissory notes: *Fink v. Canyon Road Co.*, 5 Or. 301.

Note payable to "treasurer of Philomath College" inures to the benefit of the corporation: *Philomath College v. Hartless*, 6 Or. 158.

Reservation in a note, rendering the time of payment uncertain, makes the note non-negotiable: *Barr v. Mitchell*, 7 Or. 346.

An order for the payment of a certain sum in lumber is not a draft or bill of exchange: *Hyland v. Blodgett*, 9 Or. 166.

Payee, by making demand and notice, cannot charge drawer, and the doctrines of the law merchant do not apply: *Id.*

Checks and inland bills of exchange distinguished: *Hawley, Dodd, & Co. v. Jette and Clark*, 10 Or. 31.

Stipulation for reasonable attorneys' fees in event of action thereon is valid and enforceable against the maker: *Peyser v. Cole*, 11 Or. 39.

Note given for payment of interest on interest previously due is valid: *Hathaway v. Meads*, 11 Or. 66.

Note taken by resident agent of foreign insurance company which has not complied with statute of Washington Territory, regulating doing of business by such corporations, is void: *Hacheny v. Leary*, 12 Or. 40.

Signature placed on a note by one having authority to sign another's name makes it the note of the latter: *State v. Lurch*, 12 Or. 95.

Note for the payment of a given sum of money at a fixed time, payable in wheat at a given price per bushel at a place stated, is payable in money or wheat at the option of the maker: *Cook v. Blalock*, 1 W. T. 560.

Written instrument constituting both a note and a mortgage, the holder at his option may recover money judgment on it as a note, or proceed to foreclose: *Frank v. Pickle*, 2 W. T. 55.

**Bills and Notes (continued).****2. INDORSEMENT AND TRANSFER.**

After assignment of the note by the payee, a written indorsement by the maker to pay higher interest is void as without consideration, and does not operate to discharge indorsers: *Schlüssel and Rosen v. Warren*, 2 Or. 17.

One who adds "security" after his indorsement is a mere indorser, and not a guarantor or maker: *Kamm v. Holland*, 2 Or. 59.

Payee indorsing note to his order becomes first indorser without regard to time of his indorsement, or its location on the note: *Cogswell v. Hayden*, 5 Or. 22.

Second indorser may recover from first indorser money paid on the note: *Id.*

The rule of liability is not altered in favor of accommodation indorsers: *Id.*

Indorser discharged by laches of holder may subsequently become liable by promise made, knowing his discharge: *Johnson v. Arrigoni*, 5 Or. 485; *Smith v. Lownsdale*, 6 Or. 78.

Payee putting his name on the face of the note under that of the maker on transferring the note becomes indorser: *Id.*

Indorser taking sufficient security to protect himself waives his right to proof of demand and notice: *Smith v. Lownsdale*, 6 Or. 78.

Parties may make separate contract governing their liability, and may make contract as for indorsement on separate paper, and attach same to the note: *Moore v. Miller*, 6 Or. 254.

Transfer of note payable to order without indorsement passes equitable ownership, and entitles the holder to sue upon it in his own name: *Id.*

Purchaser before maturity, with notice of fraud in the making, takes subject to equities and defenses that would exist between the original parties to the note. *De Lashmutt v. Everson*, 7 Or. 212.

Such purchaser cannot protect himself by way of estoppel against the maker, with admissions of the latter made without knowledge of the facts: *Id.*

One who signs his name on the back of a non-negotiable



**Bills and Notes** (continued).

note before delivery is liable as a maker: *Barr v. Mitchell*, 7 Or. 346.

Parol evidence is not admissible to explain or limit the effect of an indorsement in blank: *Smith v. Caro and Baum*, 9 Or. 278.

The right of an indorsee with notice of failure of consideration cannot be superior to that of his indorser: *Davis v. Wait*, 12 Or. 425.

**3. GUARANTY AND SURETY.**

Signing name on back of a note with word "security" does not make signer guarantor or maker: *Kamm v. Holland*, 2 Or. 59.

Indorsee of note, given as guaranty in consideration of extension of time to maker of another note also owned by such indorsee, may sue on former note, although the latter is not indorsed to him by the payee: *Moore v. Miller*, 6 Or. 254.

Judgment, on note, against principal, is no bar to action against principal and surety on another note given as collateral security for the payment of the first, unless the judgment has been satisfied: *McCullough v. Hellman*, 8 Or. 191.

Extension to principal "until after harvest" is void for uncertainty, and will not discharge surety: *Findley v. Hill*, 8 Or. 247.

Neglect of creditor to sue principal when note is due, as requested by the surety, does not discharge the surety, although the principal afterwards becomes insolvent: *Id.*

Relinquishment by creditor of collateral security exonerates surety: *Brown & Co. v. Rathburn*, 10 Or. 158.

Such defense is available to the surety in an action at law against him by the creditor or his assignee with knowledge of the facts: *Id.*

Surety on note may show by parol that he is such surety: *Baker and Smith v. Eglin*, 11 Or. 333; *Harmon v. Hale*, 1 W. T. 422.

Such showing may be made in an action at law: *Harmon v. Hale*, 1 W. T. 422.

Forbearance to sue principal, after request in writing by the surety, as provided by statute, discharges surety: *Id.*

**Bills and Notes** (continued).

Verbal request by surety is not sufficient in such case: Id.

Fraudulent conduct by the payee that misleads surety and prevents his obtaining indemnity will discharge the surety: Id.

**4. PRESENTMENT, DEMAND, AND NOTICE.**

One who adds the word "security" after his indorsement is entitled to demand and notice as indorser: *Kamm v. Holland*, 2 Or. 59.

Waiver of demand and notice may be made by parol: *Smith v. Lownsdale*, 6 Or. 78.

Indorser taking sufficient security to protect himself waives proof of demand and notice: Id.

Language of waiver is to be strictly construed in favor of debtor: *Sprague v. Fletcher*, 8 Or. 367.

Waiver of notice of protest for non-payment is not a waiver of demand of payment from maker: Id.

Indorsement after maturity is in effect drawing new note, and demand and notice of non-payment are essential: *Smith v. Caro and Baum*, 9 Or. 278.

Insolvency of payee of draft, though known, does not excuse presentment for payment and notice: *Hawley, Dodd, & Co. v. Jette and Clark*, 10 Or. 31.

Where one of two parties, makers of a note, dies before maturity of the note, presentment must be made to the survivor, and not to the executor of the deceased partner: *Barlow and Shepherd v. Coggan*, 1 W. T. 257.

**5. PLEADING, PRACTICE, EVIDENCE, ETC.**

It is a sufficient allegation to show that plaintiff is owner of the note to allege that "defendant made his promissory note in writing, and thereby promised to pay plaintiff": *Moss v. Cully*, 1 Or. 147.

Complaint that omits to show that the note is due is insufficient: *Williams v. Knighton*, 1 Or. 234.

In case a payment is made on note, limitation begins to run from the time of such payment: *Partlow v. Singer*, 2 Or. 307, *Koslowski v. Yesler*, 2 W. T. 407.

Partner served, sued on joint note, may plead misjoinder and non-joinder: *Kamm v. Harker*, 3 Or. 208.

One joint maker has the right to have all made parties: Id.

**Bills and Notes** (continued).

Adding "in gold coin" to note is a material alteration:  
Wells v. Wilson, 3 Or. 308.

Payee taking with notice that the alteration was made without the consent of one of the makers, the latter is not bound; but if without notice, the latter is bound upon the original note: *Id.*

Reasonable attorneys' fees in note construed as statutory fees rather than usury: Gaston v. McLeran, 3 Or. 389.

Denial that D. delivered the note does not put in issue allegation that he made, executed, and delivered it: Cogswell v. Hayden, 5 Or. 22.

Denial of transfer "for value received," and denial of indebtedness raise no issue: *Id.*

Note given on expressed consideration of transfer of a machine at maturity to maker: held, an independent promise, and transfer not a condition precedent: Hawley v. Bingham, 6 Or. 76.

False representations to constitute defense must have been relied on and induced the execution of note: Dunning v. Cresson, 6 Or. 241.

When no time of payment is expressed in a note, it is deemed payable immediately: Dodd v. Denny, 6 Or. 156.

Giving of promissory note is *prima facie* evidence of settlement: Matasce v. Hughes, 7 Or. 39.

Admission in pleadings of purchase with notice of defective title preclude proof to the contrary: De Lashmutt v. Everson, 7 Or. 212.

Person not in possession of negotiable paper is presumed to have no authority to receive payments, but the presumption is disputable: Swegle v. Wells, 7 Or. 222.

Burden is on plaintiff suing on note given to secure the payment of another note, to show that both are due and unpaid: Moore v. Miller, 7 Or. 486.

The rule inhibiting parol evidence to vary writing applies particularly to negotiable paper: Smith v. Caro and Baum, 9 Or. 278.

On joint and several note, judgment against some of defendants is no bar to an action against the others: Sears v. McGrew, 10 Or. 48.

Where surety answers jointly with other defendants, and

**Bills and Notes** (continued).

- states facts constituting a defense for himself alone, objection that he did not answer separately must be taken before judgment: *Brown & Co. v. Rathburn*, 10 Or. 158.
- Alteration by a stranger, with intent to cancel note, raises no presumption of payment: *Whitlock v. Maniet and Bigne*, 10 Or. 166.
- Proof that indorser was, at time of indorsing, able to pay the note, is not admissible for the purpose of raising a presumption that he was an accommodation indorser merely: *Id.*
- Note of married woman is not absolutely void; but if made within her rights as a married woman to contract, this must be alleged and proved affirmatively, in reply to the defense of coverture: *Wells v. Applegate*, 10 Or. 519.
- Where, on the face, the intention to hold the principal or only the agent signing is uncertain, *semble* that parol evidence is admissible as between the parties: *Guthrie v. Imbrie*, 12 Or. 182.
- Person signing his name, adding simply "Pres." or "Sec.," is personally liable: *Id.*
- But president and secretary so signing, and also affixing the corporate seal with the name of the company thereon, bind the company: *Id.*
- Partial failure of consideration may be set up as a defense, and defendant may recoup his damages, though they be unliquidated: *Davis v. Wait*, 12 Or. 425.
- Note payable at particular place, payee must tender at the time and place, and must deposit and keep the sum intact, and pay it into court when sued: *Adams v. Rutherford*, 13 Or. 78.
- Semble*, that a provision in a note for forfeiture for failure to pay interest at the time and place is governed by law of contracts, and not by law merchant, and plaintiff must show performance on his part: *Id.*
- Equity will not decree forfeiture in such case, where the default was occasioned by the plaintiff's own conduct: *Id.*
- Defense of failure of consideration is proved by establishing that the note was given for medical services upon agreement that unless a cure was effected there should



**Bills and Notes (continued).**

be no pay, and that the plaintiff falsely represented that he had cured defendant, and thereby induced the execution of the note: *Andros v. Childers*, 14 Or. 446.

Judgment on a note bearing three per cent interest per month cannot be rendered for more than the legal rate: *Roeder, Peabody, & Co. v. Brown*, 1 W. T. 112.

Note for one thousand dollars currency, accompanied by written contract, that if paid in coin it should be valued at five hundred dollars, cannot be discharged by payment of five hundred dollars in currency: *Westbrook v. Chapman*, 1 W. T. 227.

Court being unable to conclude with certainty what was intended by a clause in a note respecting interest, and it being repugnant to the rest of the note, rejected the same: *Hazard v. Maxon*, 1 W. T. 585.

*Quære*, whether parol evidence is admissible to prove, as a defense to a note secured by mortgage, that it was to be payable only upon the execution by the payee of a deed to the premises to the mortgagor: *Kenworthy v. Merritt*, 2 W. T. 155.

Purchaser of real estate, having been placed in possession, cannot defend against the notes for purchase price on the ground that a further deed had not been executed as agreed, unless he first tender reconveyance: *Id.*

The fact that a trustee of a corporation, who had a demand against the corporation, was present at a meeting of the board of trustees, which gave the note of the corporation to him in payment, does not of itself render the note invalid: *Budd v. W. W. P. & P. Co.*, 2 W. T. 347.

Controverted allegation of the giving of a due bill for value received may be proved by parol by showing that the maker had given the same in payment of the payee's interest in land purchased in the name of the maker: *Bigelow v. Scott*, 2 W. T. 378.

Such proof is not within the statute of frauds as proving a contract for sale of land not in writing: *Id.*

Payment and acceptance of interest on a note relieves it from the statute of limitations: *Koslowski v. Yesler*, 2 W. T. 407.

**Bills of Lading.** See Common Carriers.

**Bills of Review.** See Equity; Judgments.

**Board of Commissioners** (continued).

Member cannot receive compensation for extra services above the statutory compensation: *Territory of Oregon v. King*, 1 Or. 106.

Where statute requires board to keep a clerk, and does not fix his salary, he is entitled to reasonable compensation: *Territory of Oregon v. Norris*, 1 Or. 107.

**Board of Commissioners for Sale of School Lands.**

See Public Lands.

**Board of County Commissioners.** See Appeal and Error; Bridges; County Court; Ferries; Highways; Mandamus; Parties; Paupers.

**Board of Equalization.** See Taxation.

**Boats and Vessels.** See Admiralty; Liens; Water and Watercourses.

The owners of a vessel are liable for injuries to a by-stander occasioned by the careless firing of a signal gun by their agent, though the latter does not strictly follow his orders as to the manner of firing: *Oliver v. North Pacific Trans. Co.*, 3 Or. 84.

A revenue cutter of the United States is not subject to process to enforce mechanic's lien in state court: *Goldsmith v. Revenue Cutter*, 6 Or. 250.

Material-men, furnishing material used by a person who has a contract to build and deliver the hull of a boat, have no lien on the boat after it is finished: *Northup v. The Pilot*, 6 Or. 297.

Boat under section 17, chapter 13, Miscellaneous Laws (p. 1599, *Hill's A. L.*), is a complete vessel, not a hull merely: *Id.*

Passenger may go ashore at points where steamboat lands before arriving at his destination, without forfeiting his right to safe ingress and egress, and the owners of boat are liable to passenger injured in so landing: *Dice v. W. T. & L. Co.*, 8 Or. 60.

Passenger has no right to presume ferry-boat landed where chain-guard is down, when personally notified otherwise: *Davis v. O. & C. R. R. Co.*, 8 Or. 172.

Incomplete hull or lower part is not a "vessel" within section 773 of the Civil Code (sec. 783, *Hill's A. L.*): *Yarnberg v. Watson*, 13 Or. 11.

**Boats and Vessels** (continued).

Sale of such incomplete part need not be in writing: *Id.*

Instruction assuming same to be a vessel, and not leaving the question to the jury, is erroneous: *Id.*

Power of master to bind owners of vessels: *Gove v. Moses*, 1 W. T. 7.

Steamer is not liable for material sold to one who has a contract to put in machinery, when the owner and his agents did not authorize the using of such material: *Waddell and Miles v. Steamer Daisy*, 2 W. T. 76.

Whether a contract for furnishing material for a vessel is a maritime contract depends upon whether the vessel was so far finished that anything further done upon her would be in its nature maritime: *Id.*

**Bonds and Undertakings.** See Appeal; Ferries; Liquor Laws; Suretyship.

1. GENERALLY.

2. OFFICIAL AND STATUTORY.

3. ACTIONS ON.

1. GENERALLY.

Firm name signed as surety binds partner signing only, unless signed with assent of firm: *Charman and Warner v. McLane*, 1 Or. 339.

Lock bonds redemption act of 1874 unconstitutional, as impairing obligations of contracts: *Goldsmith v. Brown*, 5 Or. 418.

Bond for deed, made prior to September 27, 1850, can be enforced against obligee after he obtains donation patent: *Parker v. Rogers*, 8 Or. 183.

Covenant to indemnify persons jointly and severally liable on a bond will be held to follow the bond and be joint and several also: *Hughes v. Oregon R'y & Nav. Co.*, 11 Or. 437.

Effect of bond for a deed is to transfer the equitable title, and vendor holds the legal title merely as security for the sum due: *Burkhart v. Howard*, 14 Or. 39.

Where the obligor in such bond subsequently mortgages the land, the mortgagee takes the security held by the former, to the extent of the mortgage: *Id.*

An assignee, after maturity, of the vendee's notes, acquires no more interest than his assignor, although the mortgage was not recorded until after the note was assigned: *Id.*

**Bonds and Undertakings (continued).**

Sureties are not estopped to deny liability on bond in which penal sum has been inserted after signing and sealing, and after passing from their control, though bond was accepted without knowledge of the alteration: *Walla Walla Co. v. Ping*, 1 W. T. 339.

Alteration after signing and sealing, before delivery, but after passing from control of maker, renders bond void: *Id.*

Rule like that of *careat emptor* applies in the case of one who accepts a bond; he must assure himself of its validity: *Id.*

**2. OFFICIAL AND STATUTORY.**

Recognizance to appear at next "term" of court is good, and requires appearance at next "sitting": *Gird v. State*, 1 Or. 308.

Redelivery bond under statute operates to absolutely discharge the property from attachment: *Duncan v. Thomas*, 1 Or. 314.

County commissioners cannot require sheriff to give new bond on pain of removal from office: *Ruckles v. State*, 1 Or. 347.

After approval of a sheriff's bond, commissioners cannot of their own motion disapprove same, and thus change the vested rights of parties in the bond: *Wren v. Fargo*, 2 Or. 19.

Upon bail bond to appear at certain term, sureties are not released by continuance to next term: *Waldron v. Harrison*, 2 Or. 87.

Executor and his sureties not liable for the misfeasance or non-feasance of the executor until after default of the latter is determined in Probate Court: *Hamlin v. Kinney*, 2 Or. 91; *Adams v. Petrain*, 11 Or. 304.

Bonds in criminal matters are statutory, and if not good under statute, cannot be held good as common-law bonds: *Williams v. Shelby*, 2 Or. 144.

Statutory undertaking for bail is not a recognizance, but a simple promise on conditions: *State v. Hays*, 2 Or. 314; *Whitney v. Darrow*, 5 Or. 442.

When the undertaking is signed and justification completed, it is sufficient: *Id.*



**Bonds and Undertakings** (continued).

Undertaking upon arrest in civil action is not a bond or writing obligatory: *Paddock v. Hume*, 6 Or. 82.

Though such undertaking is not required by statute to contain a promise to pay any judgment that the obligee might recover against the principal, such promise, if made, is binding, where want of consideration is not pleaded: *Id.*

Bond not authorized by statute may bind as a common-law bond: *Id.*

City marshal of Oakland is not required under the charter to file an official undertaking: *Young v. Patton*, 9 Or. 195.

Delivery and acceptance of official bond of municipal officer may be inferred from circumstances: *City of Portland v. Besser*, 10 Or. 242.

So where the city was in possession of such bond, and the officer was occupying and receiving the salary of the office, a delivery may be inferred: *Id.*

The condition of a bond for faithful performance of duty is performed when the officer discharges his duty faithfully and honestly, according to his ability: *State v. Chadwick*, 10 Or. 465.

He is held liable only for the degree of skill he possesses: *Id.*

Power of city of Portland to require bond from applicant for liquor license; validity of the provisions respecting the form of such bond: *Matter of Schneider*, 11 Or. 288.

Replevin bond is for the especial purpose of indemnifying the obligee or his assignee against damages adjudged in the particular suit in which it is given: *Boyer v. Fowler*, 1 W. T. 101.

Official bond with no penal sum named in it, but left blank, is a nullity: *Walla Walla Co. v. Ping*, 1 W. T. 339.

The acceptance of a void official bond, by a public officer, whether judicial or ministerial, is the same in effect as an acceptance by a private individual, and cannot alter the rules governing the liability of the sureties thereon: *Id.*

**3. ACTIONS ON.**

It is not a sufficient answer in an action on a forthcoming

**Bonds and Undertakings** (continued).

bond, given in an attachment suit, under the act of 1851, to say that the defendants in the attachment "surrendered themselves to the process of the court in that suit": *Norton v. Winter*, 1 Or. 97.

Dissolution of injunction operates as technical breach of injunction bond: *Stone v. Cason*, 1 Or. 100.

Action on sheriff's bond for not returning certified tax list, an uncertified tax list offered as proof of money had and received, is not admissible: *Fargo v. County Commissioners*, 1 Or. 262.

Action does not lie on redelivery bond when, after accepting the bond, the sheriff reattached the property: *Duncan v. Thomas*, 1 Or. 314.

Such reattachment within the time allowed for redelivery is tantamount to redelivery, and discharges the undertaking: *Id.*

In an action on undertaking for bail, not error to prove discharge of defendant by parol: *State v. Hays*, 2 Or. 314.

Nor to permit the magistrate, who was present, to append his certificate, during the trial, to the undertaking: *Id.*

Assignee of bond conditioned against obligor's engaging in a certain business cannot sue for breach; obligation is personal, and until breach obligee has no assignable right: *Hillman v. Shannahan and Wadhams*, 4 Or. 163.

District attorney may sue in his own name as plaintiff in action on bail bond: *Hannah v. Wells*, 4 Or. 249.

Complaint in such action must show that the accused was charged with a crime known to the law: *Id.*

Where undertaking of administrator omitted penal sum, mistake will not be presumed against the sureties: *Evarts v. Steger*, 5 Or. 147.

Such bond is void, and cannot be reformed and made operative in equity: *Evarts v. Steger*, 6 Or. 55.

The right of action on undertaking for costs in a Justice's Court does not pass to the assignee of the judgment by virtue of the assignment: *Dray v. Mayer*, 5 Or. 185.

The word "dollars" may be supplied in an action on a bail bond when omitted in the bond: *Whitney v. Darrow*, 5 Or. 442.

The surrender of the principal by the sureties in a bond

**Bonds and Undertakings (continued).**

on civil arrest does not exonerate them if the bond is conditioned to pay the judgment: *Paddock v. Hume*, 6 Or. 82.

Where bond by county clerk is lost and the record copy is destroyed, a person damaged by the official delinquency of the officer can maintain suit in equity against the sureties to establish its contents by parol proof and obtain leave to sue on it: *Howe v. Taylor*, 6 Or. 284; *Howe v. Taylor*, 9 Or. 288.

In such case equity will afford complete relief, and on proof of the undertaking will decree payment by the sureties of such sums as they are found liable for: *Howe v. Taylor*, 9 Or. 288.

Such bond, though not in accordance with the statute, binds the sureties: *Id.*

Action on an official undertaking is not an action to recover fines and forfeitures under statute allowing district attorney ten per centum: *Claim of Ison*, 6 Or. 469.

What is sufficient complaint in action on undertaking in replevin: *Cooper v. McGrew*, 8 Or. 327.

When the original bond of county clerk is lost and the record destroyed, parol evidence is admissible to prove the contents and the names of sureties: *Howe v. Taylor*, 9 Or. 288.

In the absence of evidence to the contrary, it is presumed such bond was in compliance with the law: *Id.*

Both original and copy being lost, evidence of the contents of the copy is admissible: *Id.*

Testimony of persons alleged to be sureties, that they have no recollection of signing, is to be given little weight as against positive evidence: *Id.*

False representations, but not known to be false by the party making them, inducing the execution of a bond, afford no defense to an action at law on the bond: *Smith v. Cox*, 9 Or. 327.

On appeal from order of confirmation of judicial sale, an undertaking to pay value of the use of the premises pending appeal is void, and does not bind the sureties: *Bank of British Columbia v. Harlow and Page*, 9 Or. 338.

Such bond, not being provided for by law, gives appellant no right of possession: *Id.*

**Bonds and Undertakings (continued).**

In the absence of malice and want of probable cause, a person damaged by an injunction is confined to his remedy on the injunction bond: *Ruble v. Coyote G. & S. M. Co.*, 10 Or. 39.

Remedy of person damaged by injunction must be found at law, and not in equity: *Id.*

Action on bond of sheriff, proper remedy for damages by his failure to levy: *Habersham v. Sears*, 11 Or. 431.

Covenant of indemnity against "actions brought in accordance with" a certain bond, construed to include all actions whether well or ill founded: *Hughes v. Or. R'y & Nav. Co.*, 11 Or. 437.

In replevin, sureties are liable on the immediate delivery bond, though the indorsement on the affidavit directing the sheriff is irregular: *Carlton v. Dixon*, 12 Or. 144.

In an action on injunction bond, complaint must allege that the injunction was wrongful and without probable cause: *Olds v. Cary*, 13 Or. 362.

But answering over after demurrer to such defective complaint waives the defect: *Id.*

When attorneys' fees expended in defending in the injunction suit are recoverable as an element of damages in action on injunction bond: *Id.*

The sureties on a replevin bond are liable for costs of the action upon judgment adverse to plaintiff: *Carlton v. Dixon*, 14 Or. 293.

So they are liable for interest for the delay in payment by way of damages for the breach: *Id.*

The sureties are liable to the amount of the penalty only, and costs: *Id.*

In an action on a bail bond, the record held to sufficiently import that the case came on for trial upon the indictment, and defendant made default: *Clifford v. Marston*, 14 Or. 426.

In Oregon, the journal of the court is evidence against the sureties to prove the default of the principal upon the bail bond: *Id.*

The old rule of trying the issues on a replevin bond stated: *Boyer v. Fowler*, 1 W. T. 101.

The suit in which the bond was given having been dismissed, the plaintiff is concluded from maintaining



**Bonds and Undertakings** (continued).

action on the replevin bond, there being no judgment in favor of the obligee: *Boyer v. Fowler*, 1 W. T. 101; *contra*, *Meigs v. Keach*, 1 W. T. 305.

**Books of Account.** See Evidence.

**Booms.** See Water and Watercourses.

**Boundaries.** See Adverse Possession; Deeds; Fences; Public Lands.

Boundaries to public land claims may be investigated by courts incidentally to the exercise of other powers, although the title is still in the United States: *Wood-sides v. Rickey*, 1 Or. 108; *Lee v. Simonds*, 1 Or. 158; *Colwell v. Smith*, 1 W. T. 92.

Owners of party-wall are not tenants in common, but each has a right to use: *Burton v. Moffitt*, 3 Or. 29.

Iron pilaster erected beyond center line of party-wall by one party is an encroachment: *Id.*

Injunction to remove same denied in exercise of discretion in this case: *Id.*

So, where wall was so built as to diminish width of party's premises above second story: *Id.*

Neither railroad company nor adjoining owner is required by law to fence boundary between them: *Oregon Central R. R. Co. v. Wait*, 3 Or. 91.

Ascertained boundaries and monuments control inconsistent lines, angles, or surfaces: *Lewis v. Lewis*, 4 Or. 177; *Goodman v. Myrick*, 5 Or. 65.

Locality of lost stake may be ascertained in law as well as in equity: *Goodman v. Myrick*, 5 Or. 65.

In government surveys the line actually run is the true line: *Goodwin v. Myrick*, 5 Or. 65; *Weiss v. Oregon Iron etc. Co.*, 13 Or. 496.

When parol evidence is admissible to fix or locate boundaries and monuments: *Raymond v. Coffey*, 5 Or. 132; *Boehreinger v. Creighton*, 10 Or. 42; *Goddard v. Parker*, 10 Or. 102.

Metes and bounds will control quantity, though not correctly stated in the deed: *Id.*

The United States can grant only to the meander line of high tide, and not the tide lands below: *Hinman v. Warren*, 6 Or. 408; *Parker v. Taylor*, 7 Or. 435.

The actual stream, and not the meandered line as im-

**Boundaries (continued).**

properly located by government survey, is the boundary of a riparian owner on a navigable stream: *Minto v. Delaney*, 7 Or. 337; *Weiss v. Oregon Iron etc. Co.*, 13 Or. 496.

Party entering under color of title is presumed to occupy according to the boundaries in his deed: *Phillippi v. Thompson*, 8 Or. 428; *Joy v. Stump*, 14 Or. 361.

Owner of a tract described by metes and bounds acquires no title to the soil of a street, subsequently dedicated by his grantor, adjoining his tract: *Knott Brothers v. Jefferson Street Ferry Co.*, 9 Or. 530.

Parol evidence to locate a stake mentioned as a starting-point in a deed, admissible: *Boehreinger v. Creighton*, 10 Or. 42.

Boundary of lot, described "as laid out" by A, must be proved as matter of essential description: *Goddard v. Parker*, 10 Or. 102.

Common reputation is competent evidence of location of boundary, under the statute: *Id.*

Boundary established by common reputation is not disproved by proof of expression of opinion by former owner contrary thereto: *Id.*

Defective description in a complaint, by natural objects, apparently including a tract of land, cannot be reached by demurrer: *Ladd and Tilton v. Mason*, 10 Or. 308.

Agreements fixing boundary line in dispute will not be upheld or enforced, unless the true line was unknown and uncertain: *Lennox v. Hendricks*, 11 Or. 33.

Such parol agreements are held invalid as against statute of frauds, where the element of uncertainty does not exist: *Id.*

The first point reached by high water in ordinary seasons is the true meander line and boundary of the United States: *Johnson v. Knott*, 13 Or. 308.

Opinion of a witness as to whether a piece of land is within a certain donation claim is inadmissible: *Id.*

Description in an order of confirmation of sale on execution, without describing boundaries, of a part of a certain donation claim, is insufficient to identify the land: *Swift v. Mulkey*, 14 Or. 59.

Boundary described as the meander line of a stream fol-

**Boundaries (continued).**

flows the sinuosities of the stream, though courses be also given which indicate straight lines: *Turner v. Parker*, 14 Or. 340.

Possessory rights to public lands before patent will be protected by the courts, though questions of conflicting boundaries and priority of settlement will be left to the land department: *Colwell v. Smith*, 1 W. T. 92.

Ordinance having moved the lines and corners of a block seven feet eastward, all lines and corners mentioned in subsequent deeds will be considered those fixed by the ordinance, and not as they formerly existed: *Burmeister v. Howard*, 1 W. T. 207.

Ordinance has the force of statute, and parties are charged with notice thereof, and their boundaries under their deeds are subject thereto: *Id.*

Boundaries as described in notice filed in surveyor-general's office, and approved by the executive department of the government, will be upheld by the courts, though loose and somewhat indefinite: *Shockley v. Brown*, 1 W. T. 463.

**Breach of Promise.** See Marriage.

**Bribery.** Promise by candidate to pay into county treasury part of his salary is not such an offer as to disqualify, unless shown to benefit those to whom offered: *State v. Church*, 5 Or. 375.

Complaint to try title to office for bribery of voters must show the promise to be to benefit voters: *Id.*

**Bridges.** See Highways.

County liable under section 347 of Code (sec. 350, Hill's A. L.), for injury occasioned by defects in: *McCalla v. Multnomah Co.*, 3 Or. 424.

Road supervisor, agent of county, is liable for his neglect to repair: *Heilner v. Union Co.*, 7 Or. 83.

Repairs to, by county, must be let to lowest bidder except in emergency, when county judge may order: *Springfield Milling Co. v. Lane Co.*, 5 Or. 265.

A person who repairs a county bridge without authority cannot hold county liable for compensation: *Id.*

In action against the county for injury by defective bridge, notice of the defect must be alleged: *Heilner v. Union Co.*, 7 Or. 83.

The facts constituting the negligence must be alleged: *Id.*

**Brokers.** See Bailments.

One who is a salaried agent, not acting for a fee or rate per cent for others, is not a broker: *City of Portland v. O'Neill*, 1 Or. 218.

City of Portland has no power to license such persons as brokers: *Id.*

A broker loaning money on inadequate security is released from liability therefor, by his principal signing a composition agreement releasing the borrower: *Nicolai v. Lyon*, 8 Or. 56.

Real estate agent earns his commission when he brings buyer and seller together, although the seller then refuses to sell: *Fisk v. Henarie*, 13 Or. 156.

Seller requesting broker by letter to sell at certain terms, formal answer is not necessary to complete contract; but when buyer is found and produced, commission is earned: *Id.*

**Burden of Proof.** See Evidence.**Canals.** See Bonds; Eminent Domain.**Capital Stock.** See Corporations.**Carriers.** See Common Carriers.**Cattle.** See Animals.**Cause of Action.** See Complaints; Pleadings.**Caveat Emptor.** See Sales.**Centennial Commission.**

Duty of state treasurer to set aside a fund for payment of warrants, under act of 1872, providing for the appointment of commissioners and the payment of expenses: *Simon v. Brown*, 5 Or. 285.

Warrants under the act cannot be paid from funds provided by general appropriation act of 1874: *Id.*

**Certificates.** See Acknowledgments; Appeal and Error; Attorneys; Depositions; Elections; Evidence; Public Lands; Reference; Taxation.**Certiorari.** See Review, Writ of.**Cestui que Trust.** See Trusts and Trustees.**Challenges.** See Jury and Jury Trial.**Champerty.**

Assignment to an attorney of a right of action to enable him to sue in his own name, stipulating for two thirds thereof as compensation, is champertous and void: *Dahms v. Sears*, 13 Or. 47.



**Champerty (continued).**

Attorney may contract for percentage or contingent fee, but cannot buy a claim for a part thereof to enable him to sue in his own name: *Id.*

**Chattel Mortgages.**

Unless recorded or accompanied by delivery, void against subsequent attachment: *Monroe v. Hussey and Burbank*, 1 Or. 188.

Simply create lien, and do not vest title until foreclosure: *Chapman v. State*, 5 Or. 432; *Knowles v. Herbert*, 11 Or. 54; *Knowles v. Herbert*, 11 Or. 240.

But after condition broken, the right of the mortgagee is more than a mere lien; it is a qualified ownership: *Case T. M. Co. v. Campbell*, 14 Or. 460.

A forfeiture of the debt for usury carries the mortgage security: *Chapman v. State*, 5 Or. 432.

President of railroad company cannot mortgage locomotive under corporate seal by virtue of his general powers: *Luce v. Isthmus Transit R'y Co.*, 6 Or. 125.

Bill of sale may be shown by parol to be a mortgage, in action by an administrator to recover property held under bill of sale from intestate: *Bartel v. Lope*, 6 Or. 321.

Tender in writing, if refused, will discharge lien of chattel mortgage: *Id.*

When it appears on the face of the mortgage or otherwise that the mortgagor has been given unlimited power of sale, the mortgage is void as to third persons: *Orton v. Orton*, 7 Or. 478; *Jacobs Brothers & Co. v. Ervin*, 9 Or. 52; *Bremer & Co. v. Fleckenstein and Mayer*, 9 Or. 266; *Wineburgh v. Schaer*, 2 W. T. 328.

In such case, there being no lien as against innocent purchasers, there is no mortgage: *Id.*

Either party may insist on foreclosure in the manner provided in the mortgage: *Jacobs v. McCalley*, 8 Or. 124.

But if delivery of possession to mortgagee is necessary by the terms of the mortgage, the mortgagor must comply, or he waives his right to a strict performance: *Id.*; *Sears v. Abrams*, 10 Or. 499.

Mortgagor may sell or assign the property subject to the lien of the mortgage: *Id.*

Agreement subsequent to the mortgage by which mort-

**Chattel Mortgages** (continued).

gagee took possession of logs mortgaged, sawing them into lumber at mortgagor's mill, and applying proceeds from sale thereof to debt, construed: *Friendly v. McCullough*, 9 Or. 109.

Mortgagee was allowed to deduct expense of repairing mill, and his agreed compensation for sale of lumber: *Id.*

Where no equities intervene, mortgagee may hold the mortgaged property in his hands, after payment of his mortgage, for payment for subsequent advances on the credit of the property: *Id.*

Chattel mortgage is a good consideration for an agreement to make future advances: *McFadden v. Friendly*, 9 Or. 222.

Decree and sale on foreclosure may be set aside on the ground of fraud, by creditor having a lien by attachment, in equity, without first obtaining judgment and execution: *Bremer & Co. v. Fleckenstein and Mayer*, 9 Or. 266.

Fraudulent agreement between the parties for unlimited power of sale by the mortgagor may be shown by extrinsic evidence: *Id.*

In a suit to foreclose against persons to whom the mortgaged property has been transferred, where it is alleged that the property has been converted, a personal decree for a greater amount than the value of the property converted cannot be given: *Sears v. Abrams*, 10 Or. 499.

Lien on wheat is not lost by storing in warehouse and mingling with other wheat of same quality: *Id.*

Mortgagee has no right, before foreclosure, which is subject to execution and garnishment: *Knowles v. Herbert*, 11 Or. 54; *S. C.*, 11 Or. 240.

Bill of sale intended as a chattel mortgage, and so shown by parol, is such, not only as to the parties, but as to third parties having notice: *Nicklin v. Betts Spring Co.*, 11 Or. 406.

Such bill of sale, registered as a chattel mortgage, is notice to third parties: *Id.*

Chattel mortgage to secure future advances is valid: *Id.*  
The lien of such mortgage attaches at the time of the advances, and not at date of the mortgage: *Id.*

**Chattel Mortgages** (continued).

Mortgagee may maintain trover against one who wrongfully interferes with the property: *Case T. M. Co. v. Campbell*, 14 Or. 460.

Assignee of the mortgagor cannot dispose of the property contrary to the terms of the mortgage: *Id.*

Elder mortgage, not renewed as required by law prior to the expiration of one year from the time of filing thereof, is not evidence of prior right, as against subsequent mortgage, unless accompanied by proof that the latter is fraudulent: *Id.*

In an action of trover by mortgagee against assignee, claiming the property, it is not necessary to show the amount due, but simply the conversion and qualified ownership: *Id.*

Attachment, otherwise regular, is valid as against mortgagee of chattels, though the sureties on the attachment bond did not qualify as to their financial responsibility: *Baxter v. Smith*, 2 W. T. 97.

Actual prior notice of unrecorded chattel mortgage does not give it precedence over attachment: *Id.*

Statutes respecting chattel mortgages and providing for registration thereof do not alter the rule of common law that mortgages on stocks of merchandise and sale by mortgagor, with consent of mortgagee, are void: *Wineburgh v. Schaer*, 2 W. T. 328.

Attaching creditor is entitled to injunction to prevent sale under fraudulent chattel mortgage: *Meacham Arms Co. v. Swarts*, 2 W. T. 412.

Such right is accorded to him, not only as matter of equity jurisdiction, but by statute relating to foreclosure of chattel mortgages: *Id.*

Where temporary injunction has been granted in such case, the creditor should, upon obtaining judgment, be permitted to file supplemental bill showing the fact of judgment in his favor: *Id.*

**Chancery.** See Equity.

**Change of Venue.** See Venue.

**Character.** See Evidence.

**Charge of Court.** See Criminal Law; Jury and Jury Trials.

**Charters.** See Corporations; Municipal Corporations.

**Checks.** See Bills and Notes.

**Child.** See Parent and Child.

**Chinese.**

Where, in contract for doing work for a city, it was provided that the contract was to be void if Chinese were employed, upon breach of the condition the city need not resort to equity to annul: *City of Portland v. Baker*, 8 Or. 356.

**Choses in Action.** See Administrators and Executors; Assignments; Taxation.

**Circuit Courts.** See Courts; Judges; Judgments and Decrees; Jurisdiction; Practice; Rules of Court.

Have supervisory control of all inferior tribunals by *certiorari*: *Thompson v. Multnomah County*, 2 Or. 34.

Cannot entertain action on administrator's bond for alleged delinquencies until a settlement of his accounts in County Court is had: *Hamlin v. Kinney*, 2 Or. 91; *Adams v. Petrain*, 11 Or. 304.

Have power under acts of Congress to order removal of cause to United States District Court in certain cases: *Fields v. Lamb*, 2 Or. 340.

Time for holding in third, fourth, and fifth districts not changed by act of 1870: *Smith v. Smith*, 3 Or. 363.

Have jurisdiction concurrent with justice of the peace in assault and battery: *State v. Sly*, 4 Or. 277.

Have no original jurisdiction in forcible entry and detainer: *Thompson v. Wolf*, 6 Or. 308.

Will exercise jurisdiction under section 354 of the Code (sec. 357, Hill's, A. L.) to inquire into the right to an office, although municipal board by charter has been given jurisdiction: *State v. McKinnon*, 8 Or. 493.

Where the Code does not provide for a course of proceeding, the Circuit Court will have jurisdiction, and may adopt a remedy suitable and conformable to the spirit of the Code: *Aiken v. Aiken*, 12 Or. 203.

Circuit Court has, and Justice's Court has not, power to revive a justice's judgment docketed in the Circuit Court to make it a lien on real property: *Glaze v. Lewis*, 12 Or. 347.

**Circuit Judges.** See Judges.

**Cities.** See Municipal Corporations.

**Civil Law.** See Admiralty.



**Claims.** See Administration; Attorneys; County Court; Secretary of State.

**Clerks.** See Bonds; County Clerks; Offices and Officers.

**Cloud on Title.** See Quieting Title.

One cannot dispute a title which he sets up, and upon which he bases all his right: *Eagle Woolen Mills Co. v. Monteith*, 2 Or. 277.

Plaintiff must state facts which will show that the claim amounts to a cloud: *King v. Higgins*, 3 Or. 406.

Not every instrument calculated to induce belief in the invalidity of plaintiff's title is a cloud: *Id.*

Not necessary for plaintiff to wait until disturbed by legal proceedings before bringing suit: *Id.*

Nor to establish his title by a judgment at law: *Id.*

May have relief, though his complaint shows legal title in him: *Id.*

But if it appears on the face of the papers under which defendant claims title that the legal title is in the plaintiff, the latter is not entitled to relief: *Id.*

Effect of section 500 (sec. 504, Hill's A. L.) of the Code on pleading in this class of suits: *Id.*

Application to the state made by a stranger to the title to file on land acquired by riparian owner by accretion is void, and casts no cloud on the latter's title: *Minto v. Delaney*, 7 Or. 337.

Complaint must show the apparent validity, and the real invalidity of the instrument claimed to cloud the title: *Teal v. Collins*, 9 Or. 89.

Equity will enjoin an execution sale under a satisfied judgment to prevent a cloud: *Cox v. Smith and Forward*, 10 Or. 418.

When the question is simply which party has the superior legal title, equity will not interfere: *Coolidge and McClaine v. Forward and Hencky*, 11 Or. 118.

At the suit of the grantee of a conveyance, a sale on execution upon a judgment against the grantor may be enjoined, where the *bona fides* of the conveyance is questioned: *Id.*

Sale on a judgment against one not the owner of land may be restrained when the sale would create a cloud on the title: *Wilhelm v. Woodcock*, 11 Or. 518.

Complaint alleging ownership in separate right of real

**Cloud on Title** (continued).

property by wife, and its subsequent sale on execution to satisfy judgment against husband, and delivery and recording of sheriff's deed, does not state facts sufficient to show a cloud on title: *Lemon v. Waterman*, 2 W. T. 485.

**Codes.** See Actions and Suits; Statutes.

Bills for review are original suits under Code, and defense is made by answer: *White v. Allen*, 3 Or. 103; *Crews v. Richards*, 14 Or. 442.

By dispensing with the classification of bills, Code does not take away any right of suit: *Heatherly v. Hadley and Owen*, 4 Or. 1.

Compilers of General Laws were authorized simply to collect, not to comment or deliver judgments on them, and the text of the original acts is authoritative: *Springfield Milling Co. v. Lane Co.*, 5 Or. 265.

Compilation of 1872, placing sections of Miscellaneous Laws with the Criminal Code, does not thereby change the legal effect of those sections: *State v. Gaunt*, 13 Or. 115.

Legislature cannot delegate to code commission power to amend the laws: *Id.*

Provisions of the Miscellaneous Laws cannot be transferred to the Criminal Code without appropriate legislation: *Id.*

Repeal of sections of an act printed with the Miscellaneous Laws repeals the penalty clause of the act, which has been collocated with the Criminal Code in the compilation of 1872: *Id.*

The object of codes is that courts may be able to administer justice in such manner that a good cause of action be not defeated by a legal quibble: *Tolmie v. Dean*, 1 W. T. 46.

The history of code legislation in Washington Territory, as affecting the distinctions between equity suits and law actions, practice, and procedure: *Garrison v. Cheeney*, 1 W. T. 489.

**Coercion.** See Duress.

**Coin.** See Money.

**Collections.** See Attorneys.

**Collisions.** See Admiralty.

**Color of Title.** See Adverse Possession; Cloud on Title; Possession.

**Commercial Paper.** See Bills and Notes.

**Commissioners.** See Appeals and Errors; Board of Commissioners for Erection of Penitentiary; Centennial Commission; Bridges; County Court; Ferries; Highways; Mandamus; Parties; Paupers; Public Lands; Schools.

**Commissions.** See Brokers.

**Commitment.**

An order of, by court of competent jurisdiction, not void for error of fact or law: *Fleming v. Bills*, 3 Or. 286.

Informality in, will not justify discharge on *habeas corpus*, where it is in the power of the petitioner to produce the record, and it is not produced: *Id.*

**Common Carriers.** See Admiralty; Boats and Vessels; Negligence; Railroads.

The words in a receipt of carrier, "received in good order," are *prima facie* proof of his liability, but are a recital only, and do not constitute an agreement: *Seller v. Steamship Pacific*, 1 Or. 409.

In federal courts the rule is, that carriers may limit their liability except for negligence: *Id.*

Express stipulation to that effect necessary; mere notice is insufficient: *Id.*

Draymen of shipper taking receipt from carrier, "not accountable for contents," does not bind shipper: *Id.*

Rule in admiralty suits *in rem* and *in personam* as to charging ship as carrier: *Id.*

The burden of proof is on the shipper to show value of goods injured: *Id.*

Carriers are subject to reasonable regulations by legislature as to carriage of freight and passengers through locks: *Board of Com. v. W. Trans. Co.*, 6 Or. 219.

Owner of steamboat is liable to a passenger injured in going ashore, though at a point where boat landed before arriving at his destination: *Dice v. W. T. & L. Co.*, 8 Or. 60.

Modification of contract of carriage of freight by change of address upon a package, a question for the jury: *Bennett v. N. P. Ex. Co.*, 12 Or. 49.

**Common Carriers** (continued).

Carrier is liable, in carriage of express package, until delivery or tender to consignee: *Id.*

Effect of consigning goods to owner in care of agent of carrier is to exonerate the carrier on delivery to the agent: *Id.*

Condition in freight receipt requiring written claim of loss within ninety days is waived by the carrier not requiring compliance: *Id.*

Printed notice of reward offered by the carrier, posted in conspicuous places, is admissible as evidence of admission of liability: *Id.*

Agent of the carrier, receiving money consigned, directed to his care, may testify as to the capacity and for whom he acted in receiving it: *Id.*

Private and common carriers distinguished: *Honeyman v. Oregon etc. R. R. Co.*, 13 Or. 352.

*Quære*, whether carriers of live animals are common-carriers as to them: *Id.*

Common carrier, not holding itself out as a carrier of dogs, permitting its servant to take charge of and transport dogs, is, at most, liable as a private carrier: *Id.*

Complaint charging defendant as a common carrier, no recovery can be had on proof of liability as a private carrier: *Id.*

Memorandum of receiving agent of ship, signed and showing receipt of goods for shipment and delivery, is a bill or lading: *Williams v. Steamship Columbia*, 1 W. T. 95.

Wharfinger who receives goods from ship with instructions not to deliver to consignee until payment of freightage is agent of the carrier: *Id.*

Rights of consignee on receipt of goods damaged in transit: *Id.*

Consignee in such case must use reasonable diligence in examining the goods and ascertaining the extent of injury: *Id.*

He should not be permitted to amend his libel to include damages discovered after the institution of suit, that by diligence might have been discovered before: *Id.*

**Common Council.** See *Municipal Corporations*.



**Common Law.** See Criminal Law; Jurisdiction.

No indictable common-law offenses in Oregon: Territory v. Vowels, 4 Or. 324; State v. Gaunt, 13 Or. 115.

In the absence of allegation and proof to contrary, common-law rule of limitation of actions is presumed to prevail in other states: Goodwin v. Morris, 9 Or. 322.

Common law is presumed to exist in other states, except so far as shown to be changed by statute: Cressey v. Tatom, 9 Or. 541.

**Common Nuisance.** See Nuisances.

**Common Schools.** See Schools.

**Common School Fund.** See Schools.

**Community Property.** See Husband and Wife.

**Complaints.** See Pleading.

On note, an allegation that defendant made his promissory note in writing, and thereby promised to pay plaintiff, is sufficient to show plaintiff is the owner of the note: Moss v. Cully, 1 Or. 147.

For mechanic's lien, must state when and where the labor was performed: Willamette Falls etc. Co. v. Smith, 1 Or. 171.

On note, should state facts giving cause of action, not mere conclusions of law: Williams v. Knighton, 1 Or. 234.

Such complaint is insufficient if it does not show the note sued upon was then due: Id.

In slander, what sufficient averment of publicity, and what sufficient allegation of words to charge a felony: Hurd v. Moore, 2 Or. 85.

In partition, must describe the property and the interest of the persons therein: Hanner v. Silver, 2 Or. 336.

On contract not to be performed within a year, need not allege promise was in writing: Hedges v. Strong, 3 Or. 18.

Insufficient, may give court jurisdiction to grant leave to amend: Norman v. Zieber, 3 Or. 197.

In action to recover the possession of real property, need not set out the muniments of title: Pease v. Hannah, 3 Or. 301.

In foreclosure of mechanic's lien, must show contract was made with an owner or his agent: Marooney v. McKay, 3 Or. 372.

Pleading special damages for loss of prospective earnings

**Complaints (continued).**

must show that plaintiff could not have earned an equal or greater sum elsewhere during the same time: *Brown v. Moore*, 3 Or. 435.

For goods sold and delivered, must allege facts showing a promise to pay, and that payment is due: *Bowen v. Emerson*, 3 Or. 452.

Foreclosure of mechanic's lien, must show notice was filed pursuant to statute: *D. L. & M. Co. v. W. W. M. Co.*, 3 Or. 527.

On collateral undertaking under the statute of frauds, plaintiff must declare specially: *Hayden v. Steadman*, 3 Or. 550.

The complaint must show that a contract was made between the parties, and that it was upon a consideration: *Id.*

In action on justice's judgment, seeking to acquire lien on realty when the plaintiff has neglected to file a transcript of his judgment under the statute with the county clerk, the complaint is insufficient if it does not show an excuse for such neglect: *Pitzer v. Russel*, 4 Or. 124.

Complaint on a bail bond must show that the accused was bound over on charge of crime known to the law: *Hannah v. Wells*, 4 Or. 249.

Objection to insufficiency of the facts pleaded to constitute a cause of action is not waived by answer: *King and Lounsedale v. Boyd*, 4 Or. 326; *Evarts v. Steger*, 5 Or. 147; *Mack v. Salem*, 6 Or. 275.

Complaint in action brought by plaintiff as trustee of an express trust should show for whose benefit it was brought: *Holladay v. Davis*, 5 Or. 40.

Where statute requires contract payable in gold coin to be in writing, complaint need not allege it was in writing: *Taylor v. Patterson & Co.*, 5 Or. 121; *Russell v. Swift*, 5 Or. 233.

What complaint must show in suit to reform on the ground of mistake: *Evarts v. Steger*, 5 Or. 147; *Lewis v. Lewis*, 5 Or. 169; *Stephens v. Murton*, 6 Or. 193; *Ramsey v. Loomis*, 6 Or. 367; *Smith v. Butler*, 11 Or. 46.

In action for trespass by cattle, it must be alleged that plaintiff maintained a statutory fence: *Campbell v. Bridwell*, 5 Or. 311; but otherwise where the trespass oc-

**Complaints (continued).**

- curred in a county expressly exempted from the provisions of the act: *French v. Cresswell*, 13 Or. 418.
- In action to try the right to office, for offering to reward voter and thereby becoming disqualified: *Oregon v. Church*, 5 Or. 375.
- In action for deceit, what allegations are essential: *Rolfes v. Russel*, 5 Or. 400.
- In ejectment, must set forth nature of plaintiff's estate in the premises: *Thompson v. Wolf*, 6 Or. 308.
- What sufficient to show plaintiff is especially damaged by obstruction of highway: *Milarkey v. Foster*, 6 Or. 378; *Roseburg v. Abraham*, 8 Or. 509; *Luhrs v. Sturtevant*, 10 Or. 170.
- In suit to set aside a deed on the ground of false representations, the complaint must allege that the injured party relied upon them, and was thereby misled to his injury: *Horrell v. Manning*, 6 Or. 413.
- In action for negligence, must allege the facts constituting the negligence: *Heilner v. Union County*, 7 Or. 83.
- Allegation that "one F. P., the daughter of the plaintiff," etc., is sufficient allegation that she is the daughter of the plaintiff: *Parker v. Monteith*, 7 Or. 277.
- Complaint for conversion containing no allegation of ownership, or wrongful taking from plaintiff, is insufficient: *Johnson v. Oregon Steam Nav. Co.*, 8 Or. 35.
- In action for damages for breach of promise of marriage: *Lahey v. Knott*, 8 Or. 198.
- In action for breach of undertaking given in replevin: *Cooper v. McGrew*, 8 Or. 327.
- Allegation that the work "was performed according to contract" is sufficient pleading of the performance of a condition under the Code: *Griffin v. Pitman*, 8 Or. 342; *Fisk v. Henarie*, 13 Or. 156.
- In injunction suit, must not only allege irreparable injury, but state the facts from which it will appear: *City of Portland v. Baker*, 8 Or. 356.
- Corporation, like private persons, in an action for public nuisance must allege special damage to itself by reason thereof: *City of Roseburg v. Abraham*, 8 Or. 509.
- In suit by wife to recover her one third of property of husband not divided by decree of divorce granted, must

**Complaints (continued).**

allege the interest of a person in possession who is made defendant: *Weiss v. Bethel*, 8 Or. 522.

Complaint alleging fraudulent conduct not affecting plaintiff's rights is insufficient: *Id.*

Complaint is aided by answer disclosing facts necessary, but omitted in the complaint: *Turner v. Corbett*, 9 Or. 79.

So in failing to allege performance of the contract, the complaint is sufficient after verdict, where the answer supplies the fact: *Id.*

In partition, must allege plaintiff is in possession: *Farris v. Hayes*, 9 Or. 81.

In suit to remove cloud on title, or to quiet title under section 500 of the Code: *Teal v. Collins*, 9 Or. 89.

In suit by creditor to set aside fraudulent conveyance, it is sufficient to allege the return of execution unsatisfied: *Page & Co. v. Grant*, 9 Or. 116.

On claim against school district must show that the claim has been presented to the directors: *Stackpole v. School District No. 5*, 9 Or. 508.

Allegation of judgment of a court of inferior jurisdiction must state facts showing jurisdiction: *Dick v. Wilson*, 10 Or. 490.

In forcible entry and detainer, need not aver service of notice to quit: *Chung Yow v. Hop Chong*, 11 Or. 220.

On promise to pay for services, must allege performance, or that plaintiff is legally obligated to perform, and ready and willing to perform: *Weiner v. Lee Shing*, 12 Or. 276.

Failure to allege place where the goods were taken, in replevin, is cured by verdict: *Kirk v. Matlock*, 12 Or. 319; *Moorhouse v. Donaca*, 14 Or. 430.

Or by sheriff's return on file in the cause, showing the property is within the court's jurisdiction: *Stiles v. James*, 2 W. T. 194.

Complaint that a third person rented a store to defendant, who agreed to pay rent to plaintiff, states a cause of action: *Schneider v. White*, 12 Or. 503.

In an action against sheriff for neglect to pay over money realized on a writ of execution: *Schneider v. Sears*, 13 Or. 69.



**Complaints (continued).**

In action on an injunction bond must state the injunction was wrongful and without probable cause: *Olds v. Cary*, 13 Or. 362.

Allegation of conversion and damage in a complaint in *assumpsit* may be held surplusage, and the complaint, otherwise sufficient, be held to state an action on contract: *Suksdorff v. Bigham*, 13 Or. 369.

Complaint indefinite as to whether in tort or on contract may be amended, where the facts will sustain an action on contract, to uphold an attachment already issued: *Id.*

Allegation in complaint for seduction, that the daughter was of the age of sixteen years, sufficiently alleges that she was under twenty-one: *Lee v. Cooley*, 13 Or. 433.

Complaint against a corporation, without an averment of its incorporation, is bad on demurrer; but when the defendant goes to trial without objection, the complaint will be regarded as having been amended: *Tolmie v. Dean*, 1 W. T. 46.

Complaint, being the common counts for goods sold, is not demurrable, though subject to motion to strike out or to make more definite: *Renton v. St. Louis*, 1 W. T. 215.

Complaint for malicious prosecution and arrest must state facts showing the termination of the prosecution and arrest in favor of the plaintiff bringing the action for damages: *Ferguson v. Tobey*, 1 W. T. 275.

On replevin bond stating discontinuance of suit and damages, sufficient: *Meigs v. Keach*, 1 W. T. 305.

On a bond, must aver that defendants bound themselves by their writing obligatory, and allege delivery: *Walla Walla Co. v. Ping*, 1 W. T. 339.

Complaint to charge a county for support of a pauper must show that the county recognized the person as a pauper: *Collins v. King County*, 1 W. T. 416.

Must allege that the claim against the county was presented and disallowed by the county commissioners: *Id.*

Complaint to establish title under Donation Act must allege compliance with the several requirements of section 12 of the act: *Shockley v. Brown*, 1 W. T. 463.

On a note stating that the same had not "been paid, or

**Complaints** (continued).

any part thereof, except the sum of," etc., held not to directly allege any payments; and the note being otherwise barred by limitation, complaint states no cause of action: *Yesler v. Oglesbee*, 1 W. T. 604.

In suit to set aside a judgment, where the allegations show the same subject-matter was litigated in the original action, and no facts justifying the interference of a court of equity, is insufficient: *Wingard v. Jameson*, 2 W. T. 402.

**Compensation.** See Attorneys; Contracts; Costs and Disbursements; Fees; Damages; Eminent Domain.

Fixed by statute for certain services cannot be increased: *Territory v. King*, 1 Or. 106.

Where statute requires board of commissioners to have a secretary, he is entitled to reasonable compensation: *Territory v. Norris*, 1 Or. 107.

Compensation and damages under ditch law of 1868 (c. 39, tit. 1, Hill's A. L.): *Seely v. Sebastian*, 4 Or. 25.

State treasurer as member of board of school land commissioners is not entitled to compensation for his services: *Fleischner v. Chadwick*, 5 Or. 152.

Compensation of police judge of the city of Portland: *Portland v. Denny*, 5 Or. 160; *Adams v. Multnomah County*, 6 Or. 116.

Compensation of public officers is within the control of the legislature: *Portland v. Besser*, 10 Or. 242.

Attorneys are entitled to, on collections placed in their hands, although debtor pays to creditor direct: *Saubert & Co. v. Conley and Leasure*, 10 Or. 488.

Real estate broker who finds and brings purchaser is entitled to his commission, though the seller then refuses to sell: *Fisk v. Henarie*, 13 Or. 156.

Statute requiring witnesses living within two miles of place of trial in criminal case to attend without compensation is not unconstitutional: *Daly v. Multnomah County*, 14 Or. 20.

Such services are not "particular services," within article 1, section 18, of the state constitution, which may not be demanded without just compensation: *Id.*

**Composition.** See Assignment for Benefit of Creditors.

**Composition.** See Assignment for Benefit of Creditors.

In what case the liability of third persons to creditor of insolvent is discharged by the creditors signing composition agreement: *Nicolai v. Lyon*, 6 Or. 457; S. C., 8 Or. 56.

Broker loaning money on insufficient security is released from liability by his principal signing composition agreement releasing borrower: *Nicolai v. Lyon*, 8 Or. 56.

Notice by creditors signing, of the value of their liens on property of the debtor, is presumed: *Id.*

**Compromise.**

Release of doubtful claim is sufficient consideration for counter-release of damages: *Williams v. Poppleton*, 3 Or. 139.

Criminal charge before arrest or holding to answer cannot be compromised: *Saxon v. Hill*, 6 Or. 388.

On compromise of larceny, no more than the value of the property and expenses of reclaiming it can be exacted: *Id.*

An agreement to acknowledge satisfaction is not a compromise of a crime until executed and charge dismissed: *Id.*

Compromises, and voluntary settlements of disputed claims, where characterized by good faith, are favored by the courts: *Wells v. Neff*, 14 Or. 66.

Such settlements will not be disturbed for ordinary mistake of law or fact: *Id.*

Party seeking to set aside such settlement must restore the property or rights he obtains under it: *Id.*

**Condemnation.** See Eminent Domain.

**Conditional Sales.** See Sales.

**Conditions.** See Contracts; Deeds; Sales.

**Confessions.** See Evidence.

**Confessions of Judgment.** See Judgments and Decrees.

**Confirmation of Sale.** See Executions and Supplemental Proceedings.

**Congress.** See Constitutional Law.

**Consideration.** See Bills and Notes; Contracts; Deeds; Statute of Frauds.

**Consignments.** See Contracts; Common Carriers.

**Conspiracy.**

Conversations of persons in company with defendants, as to the purpose intended, admissible to prove conspiracy: *State v. Fitzhugh*, 2 Or. 227.

Evidence of the acts and declarations of co-conspirators in prosecution of common intent admissible: *Id.*

Confession of one, made after the enterprise, does not bind other co-conspirators: *Sheppard v. Yocum and De Lashmutt*, 10 Or. 402.

**Constables.**

Sheriff, in section 110, Civil Code (sec. 112, Hill's A. L.), in regard to arrest in civil cases, includes constables: *Hume v. Norris*, 5 Or. 478.

Duty of, upon delivery by sureties of person arrested, back to constable's custody, is to acknowledge the return of the person by certificate indorsed upon a certified copy of the undertaking of bail: *Id.*

Cannot serve notice of appeal out of their precincts: *Sloper and Kelso v. Carey*, 9 Or. 511.

Chief of police acting as constable cannot retain the fees earned: *Portland v. Besser*, 10 Or. 242.

Constable may serve a summons in any precinct in his county: *Taylor v. Jenkins*, 11 Or. 274.

Constable may appoint deputy to perform a particular ministerial service, but not a permanent deputy for general discharge of his duties: *Prickett v. Cleek*, 13 Or. 415.

Judgment by default by justice, summons appearing to have been served by one signing as "deputy" constable, is void: *Id.*

**Constitutional Law.** See Jurisdiction; Statutes.

1. PRINCIPLES.

2. LEGISLATIVE POWERS.

3. THE CONSTITUTION OF OREGON.

4. THE CONSTITUTION OF THE UNITED STATES.

5. TERRITORIAL GOVERNMENT.

1. PRINCIPLES.

Statute may be void in part for unconstitutionality, and good so far as it is constitutional: *State v. Wiley*, 4 Or. 184; *Fleischner v. Chadwick*, 5 Or. 152.

In construing different parts of the constitution, effect



**Constitutional Law** (continued).

should be given to all the words: *Rugh v. Ottenheimer*, 6 Or. 231.

The principle of *stare decisis* is especially applicable when, after a court has once declared a statute constitutional, it is called upon to pass upon the question again: *Multnomah Co. v. Sliker*, 10 Or. 65.

Act, to be declared unconstitutional, must be clearly prohibited: *Cline and Newsome v. Greenwood and Smith*, 10 Or. 230; *Cresap v. Gray*, 10 Or. 345.

When a statute has long been recognized as binding, it should not be declared unconstitutional unless unequivocally so: *Crawford v. Beard*, 12 Or. 447.

**2. LEGISLATIVE POWERS.**

The legislature may authorize district judge to appoint special term: *O'Kelly v. Territory*, 1 Or. 51.

May change term of office after it is filled from two years to one: *Territory v. Pyle*, 1 Or. 149.

Legislature may change ferry rates of a ferry, the rates of which, by its charter, are subject to the same regulations by law as "other ferries are, or may hereafter be": *Stephens and Frush v. Powell*, 1 Or. 283.

Legislature may control unearned emoluments of office: *Bird v. Wasco Co.*, 3 Or. 282.

Legislature cannot create an emergency, but may declare an emergency to exist, so that an act takes effect from approval: *McWhirter v. Brainard*, 5 Or. 426.

Legislature may make reasonable regulations in regard to transportation of freight and passengers by corporation through locks: *Board of Commissioners v. W. Trans. Co.*, 6 Or. 219.

Legislature cannot authorize a private corporation to appropriate the property of an individual without just compensation first assessed and tendered: *Oregonian R'y Co. v. Hill*, 9 Or. 376.

Legislative power for public purposes, as distinguished from private, over the regulation of municipal corporations and the appointment of officers, is unlimited: *David v. Portland Water Committee*, 14 Or. 98.

The supplying of pure water to the metropolis of the state is a matter of public concern, properly within the power

**Constitutional Law** (continued).

of the legislature to control by direct act, without submission to vote of the people affected: *Id.*

Legislature has all power not expressly limited: *Id.*

Has power to control the use of streets and public property in a city, but not to divert the same from the purpose for which originally dedicated: *P. & W. V. R. R. Co. v. Portland*, 14 Or. 188.

Legislature has power to divide counties at pleasure, and apportion common burdens of taxes and public debt and the common property: *Morrow Co. v. Hendryx*, 14 Or. 397.

Has power to establish road and require counties through which it passes to bear the expense in proportion to the miles in each county: *Lewis Co. v. Hayes and Kennedy*, 1 W. T. 109.

Legislature of Oregon Territory had plenary power to grant divorces by special act, and courts have no authority to review its action: *Maynard v. Valentine*, 2 W. T. 3; *Maynard v. Hill*, 2 W. T. 321.

Distinctions between legislative and judicial powers: *Id.*  
The unlimited legislative power of British Parliament is, in American legislatures, restricted by constitutions: *Id.*

### 3. THE CONSTITUTION OF OREGON.

Justice's jurisdiction under article 7, section 1, may be increased from \$100 to \$250: *Noland v. Costello*, 2 Or. 57.

The act does not contravene article 4, section 22, since it repeals certain sections of the former act, and sets forth in full the new provisions adopted in lieu thereof: *Id.*

Under article 4, section 22, the amended act need not be set out in full as it at first stood, but it must be set out in full as amended or revised, with all changes: *Portland v. Stock*, 2 Or. 69; *Dolan v. Barnard*, 5 Or. 390.

Street assessment on adjacent lots is not in conflict with article 1, section 32, which applies only to the defraying of the general expenses of government: *King v. Portland*, 2 Or. 146.

Article 15, section 5, changes common law regarding separate property of married women: *Brummet v. Weaver*, 2 Or. 168.

The property a woman has at time of marriage, or afterward acquired by gift, devise, or inheritance, remains

**Constitutional Law** (continued).

hers by article 15, section 5, until she voluntarily parts with it: *Id.*; *Rugh v. Ottenheimer*, 6 Or. 231; *Besser v. Joyce*, 9 Or. 310.

An act conferring the jurisdiction and power of the justice of the peace on a municipal judge within municipal limits is not a special law regulating jurisdiction of justices under article 4, section 23, subdivision 1: *Ryan v. Harris*, 2 Or. 175; *Craig v. Mosier*, 2 Or. 323; *State v. Wiley*, 4 Or. 184; *Portland v. Denny*, 5 Or. 160; *Multnomah Co. v. Adams*, 6 Or. 114.

Amendment to section 93 of the Code (sec. 95, Hill's A. L.), allowing equitable defense in actions at law, not unconstitutional under article 4, section 22: *Delay v. Chapman*, 2 Or. 242.

Law requiring witness to demand fees at the term of court when earned is not contrary to article 1, section 18: *Lannahan v. Multnomah Co.*, 3 Or. 187.

Object of article 4, section 20, is to prevent matters wholly foreign to the subject expressed in title from being put in the act: *Simpson v. Bailey*, 3 Or. 515; *McWhirter v. Brainard*, 5 Or. 426; *Burch v. Earhart*, 7 Or. 58; *Singer M. Co. v. Graham*, 8 Or. 17; *O'Keefe v. Weber*, 14 Or. 55.

By the fifteenth amendment to the constitution of the United States, the restriction in the state constitution of the right to vote to white persons is void: *Wood v. Fitzgerald*, 3 Or. 568.

Executive pardon restores the privilege of an elector convicted of crime; and article 2, section 3, does not operate as a restriction upon his right to vote: *Id.*

Residence, for the purpose of voting, may be gained by an employee of the United States, or the state, independently of his employment, within article 2, section 4: *Id.*

Statute authorizing the laying out of private roads over land of another without consent is void under article 1, section 18: *Witham v. Osburn*, 4 Or. 318.

Municipal corporation cannot agree to pay certain sums annually in installments, the aggregate of which exceeds its power to contract debts, under its charter and article 11, section 5, of the constitution: *Salem Water Co. v. Salem*, 5 Or. 29.

**Constitutional Law** (continued).

- Requiring payment of a trial fee is not in contravention of article 1, section 6, which declares that justice shall be administered openly and without purchase: *Bailey v. Frush*, 5 Or. 136.
- Repeal by implication is not obnoxious to article 4, section 22: *Fleischner v. Chadwick*, 5 Or. 152; *Grant Co. v. Sels*, 5 Or. 243; *Stingle v. Nevel*, 9 Or. 62.
- Legislature cannot take from board of commissioners created by article 4, section 5, the control of funds arising from sale of school lands, and vest it in county treasurers: *Fleischner v. Chadwick*, 5 Or. 152.
- Notwithstanding article 15, section 5, husband and wife cannot contract with each other: *Pittman v. Pittman*, 4 Or. 298; *Elfelt v. Hinch*, 5 Or. 255.
- Offer to pay into treasury part of salary, made to voters by candidate, is not an offer to reward a voter within article 2, section 7, unless shown to benefit those to whom made: *State v. Church*, 5 Or. 375.
- Act of 1865, providing for loaning school funds, constitutional, and does not conflict with article 8, section 2 and section 5: *Kubli v. Martin*, 5 Or. 436.
- Amendment to charter of East Portland does not conflict with article 11, section 2, of the constitution, prohibiting formation of corporations except by general law: *East Portland v. Multnomah County*, 6 Or. 62; *Multnomah County v. Sliker*, 10 Or. 65.
- Amendment to city charter providing for excepting the territory within the city from the general road laws, and giving the city jurisdiction in such matters, is not in conflict with article 4, section 23, subdivisions 7, 8, 10, inhibiting special road laws: *Id.*
- A tax is not unconstitutional when it is equal and uniform throughout the taxing district: *Id.*
- Jurisdiction of County Court to appoint guardians for minors and lunatics is such as pertains to Probate Courts within article 7, section 12: *Monastes v. Catlin*, 6 Or. 119.
- Article 15, section 5, operates to take away any interest of the husband, subject to execution for his debts, in the lands of his wife, whether married before or after the constitution took effect: *Rugh v. Ottenheimer*, 6 Or. 231.



**Constitutional Law** (continued).

Said article 15, section 5, is not modified by article 18, section 10, providing that private rights shall not be affected by the changes effected by the adoption of the constitution: *Id.*

The deduction of benefits from damages for private property taken for public use as a road is not in conflict with the constitution: *Putnam v. Douglas County*, 6 Or. 328.

Specific appropriation to pay an existing deficiency may be embraced in general appropriation bill, within article 9, section 7, without levying a special tax to raise the fund, if there is sufficient funds in the treasury from existing taxation: *Burch v. Earhart*, 7 Or. 58.

Legislature has discretion to determine sufficiency of existing tax to pay current expenses and deficiency: *Id.*

Reference without consent of parties, under section 219 of the Code (sec. 222, *Hill's A. L.*), is not in violation to the right to jury trial under article 1, section 17, of the constitution: *Tribou v. Strowbridge*, 7 Or. 156.

Where stockholders' subscriptions are paid up, they are not liable personally for the debts of the corporation under article 11, section 2: *Bush v. Cartwright*, 7 Or. 329.

Section 29, chapter 50, *Miscellaneous Laws* (sec. 4092, *Hill's A. L.*), relating to assessment of damages for taking road material by supervisor from private lands, is not unconstitutional: *Kendall v. Post*, 8 Or. 141.

School land commissioners are by the constitution made a co-ordinate branch of the state government, and their decisions are not reviewable by the courts: *Corpe v. Brooks*, 8 Or. 222.

Trial for larceny of part of several chattels taken at same time, and belonging to the same person, bars trial for larceny of the remainder, since there is but one offense, and defendant cannot be put in jeopardy twice: *State v. McCormack*, 8 Or. 236.

Notes and mortgages are property within article 9, section 1, and are subject to taxation: *Poppleton v. Yamhill County*, 8 Or. 337.

Under article 11, section 1, the establishing of no banks is prohibited, excepting those issuing bills and notes to circulate as money: *State v. H. S. & L. A.*, 8 Or. 396.

**Constitutional Law** (continued).

Act creating and providing for construction of a wagon road, held not a local or special law within article 4, section 23, subdivision 7, of the constitution: *Allen v. Hirsch*, 8 Or. 412.

Requirement that amendment be made by publishing the act or section amended at full length does not operate as a re-enactment of those portions of the old law copied into the enactment without change: *Stingle v. Nevel*, 9 Or. 62.

Sheriff's jury to try title to property levied on does not perform judicial functions, and is not unconstitutional: *Capital Lumbering Co. v. Hall*, 9 Or. 93.

Liability of stockholder under article 9, section 2, is several and limited, and does not depend upon the amount for which other stockholders are liable: *Hodges and Wilson v. Silver Hill Mining Co.*, 9 Or. 200.

An act extending jurisdiction of justice of the peace, as such officer, over violations of town ordinances, would be void under article 4, section 23, subdivision 1: *La Fayette v. Clark*, 9 Or. 225.

An act providing for the payment of fixed sums of money for services by sheriffs and clerks of certain counties is a special law within the meaning of article 3, section 23, subdivision 10, of the constitution: *Manning v. Klippel*, 9 Or. 367.

Legislature cannot authorize a corporation to appropriate private property without just compensation first assessed and tendered: *Oregonian R'y Co. v. Hill*, 9 Or. 377.

Under article 7, section 17, district attorney is the law officer of his district, with the powers of an attorney-general at common law: *State v. Douglas County Road Co.*, 10 Or. 198.

Act of 1878 (sec. 2287, Hill's A. L.), providing for election of judges of Circuit and Supreme Court separately, is not in conflict with constitution, as giving governor power to appoint *in interim*: *Cline and Newsome v. Greenwood and Smith*, 10 Or. 230.

Provision in city charter requiring chief of police, when acting as constable, to pay the fees earned thereby to the city treasurer, is not unconstitutional under article 4, section 23, subdivision 1: *Portland v. Besser*, 10 Or. 242.

**Constitutional Law** (continued). •

- Capital punishment is not prohibited by article 1, section 15, of the constitution: *State v. Anderson*, 10 Or. 448.
- Indictment charging one present, aiding and abetting in a crime, directly with the commission of the crime, is not obnoxious to article 1, section 11, of the constitution: *State v. Kirk*, 10 Or. 505.
- Seemle*, that the mortgage tax law is not a bill for raising revenue: *Mumford v. Sewall*, 11 Or. 67.
- The act is valid though the journal does not show it was read on three separate days, where the original bill on file shows the fact: *Id.*
- Under article 5, section 8, the secretary of state on assuming the duties of the office of governor, in case of vacancy, is entitled to the salary of the office: *Chadwick v. Earhart*, 11 Or. 389.
- He is entitled to such salary, though he still performs the duties and obtains the salary of the office of secretary of state: *Id.*
- After ceasing to be secretary he still is entitled to the office of governor until the office is regularly filled by election: *Id.*•
- Mortgage tax law does not provide for unequal taxation, nor is it a special law: *Crawford v. Linn County*, 11 Or. 482.
- No class of property not exempted by the constitution, article 9, section 1, can be made exempt under state law: *Id.*
- A special law under article 4, section 23, of the constitution is synonymous with "private law": *Id.*
- Grand jury law of 1885, providing for drawing the grand jury from the list prior to the term of court, is in conflict with article 4, section 18: *State v. Lawrence*, 12 Or. 297.
- Statute allowing entry of judgment on default or on confession, in vacation, by county clerk, is not unconstitutional: *Crawford v. Beard*, 12 Or. 447.
- A law requiring registry by voters as a prerequisite to voting is void: *White v. Commissioners*, 13 Or. 317.
- A requirement to register on a previous day imposes an illegal qualification: *Id.*
- Constitutional right to trial by jury is the common-law

**Constitutional Law** (continued).

jury trial, and does not apply to trials for violation of a city ordinance: *Wong v. Astoria*, 13 Or. 538.

It is no deprivation of that right that jury trial cannot be had in an inferior court, if it can be had readily on appeal: *Id.*

Statute requiring witnesses living within two miles of place of trial, in criminal cases, to attend without compensation, is not in conflict with article 1, section 18: *Daly v. Multnomah County*, 14 Or. 20.

Such services are not "particular services," within said section; but are of the class of general services which every man is bound to render: *Id.*

An act is not obnoxious to article 4, section 20, for mingling both criminal and civil provisions in the same act: *O'Keefe v. Weber*, 14 Or. 55.

The title of "An act to prevent and punish gambling" is a general title, embracing but one subject, sufficiently expressing civil and criminal remedies provided: *Id.*

Supplemental sections amendatory of Portland charter, creating a water commission, etc., held not amendatory of a particular section, requiring contracts to be made by ordinance: *David v. Portland Water Committee*, 14 Or. 98.

Title of the act sufficiently discloses its object; title need not specify the object in all its particulars, but may state the general subject: *Id.*

The persons constituting the "water committee" under that act are not within the article 15, section 3, requiring oath of office: *Id.*

But *semble*, said section executes itself, and an act need not prescribe an oath of office: *Id.*

Persons constituting the "water commission" are not officers within the meaning of article 15, section 2, forbidding creation of office, the term of which shall be longer than four years: *Id.*

Nor are they county, township, precinct, or city officers, within article 8, sections 6 and 7: *Id.*

Right of accused to face witnesses is not denied by the admission of dying declarations or documentary evidence of collateral facts: *State v. Saunders*, 14 Or. 300.

Amendatory sections added to a city charter, conferring



**Constitutional Law** (continued).

new powers, but not altering existing provisions, are not amendments or revisions within article 4, section 22: *David v. Portland Water Committee*, 14 Or. 98; *Sheridan v. Salem*, 14 Or. 329.

An act to license liquor sales in towns, cities, and counties, held to operate as an amendment of certain municipal charters without observing the requirements of article 4, section 21: *State v. Wright*, 14 Or. 365.

Same act obnoxious to article 4, section 20, as not embracing but one subject to be expressed in the title: *Id.*

4. **THE CONSTITUTION OF THE UNITED STATES.**

One who sells liquor to Indians may be punished for same act, under act of Congress and the territorial act: *Territory v. Coleman*, 1 Or. 191.

Under United States constitution and acts of Congress, state has control of the domestic taxation, and may require taxes paid in coin: *Whiteaker v. Haley*, 2 Or. 128.

Counterfeiting is punishable in United States courts only, but the offense of having tools therefor in possession is not a part of that offense, and state may punish: *State v. Brown*, 2 Or. 221.

Act of 1874 for redeeming lock bonds, unconstitutional as impairing the obligation of contracts: *Goldsmith v. Brown*, 5 Or. 418.

Usury law of 1862 is constitutional, and does not punish one for another's crime, or impair obligation of contracts: *Chapman v. State*, 5 Or. 432.

Marriage contract is not within the purview of the section forbidding laws impairing the obligation of contracts: *Rugh v. Ottenheimer*, 6 Or. 231; *Maynard v. Valentine*, 2 W. T. 3; *Maynard v. Hill*, 2 W. T. 321.

Mortgage tax law does not impair the obligation of contracts: *Mumford v. Sewall*, 11 Or. 67.

*Quære*, whether the sixth amendment to the United States constitution, giving accused in criminal cases right to speedy trial in the district where the crime was committed, affects the courts of a territory: *Leschi v. Territory*, 1 W. T. 13.

Granting a divorce is not impairing obligation of contracts forbidden by the federal constitution, article 1, section

**Constitutional Law** (continued).

10: Maynard v. Valentine, 2 W. T. 3; Maynard v. Hill, 2 W. T. 321.

Legislative divorce by special act does not impair the obligation of contracts: *Id.*

Statute prescribing qualifications of persons practicing medicine is in no sense an *ex post facto* law: Fox v. Territory, 2 W. T. 297.

Such statute does not violate the fourteenth amendment to the constitution, either in depriving any person of his rights, or in making any unjust discrimination against him: *Id.*

**5. TERRITORIAL GOVERNMENT.**

Laws adopted by the provisional government before the territory was organized in 1848 were valid and binding before that time: Baldro v. Tolmie, 1 Or. 176.

Judgments of territorial courts were transferred to state courts by act of June 4, 1859, and the repeal of that act did not affect such judgments: Strong v. Barnhart, 5 Or. 496.

Territorial Probate Court was a court of inferior and limited jurisdiction: Farley v. Parker, 6 Or. 105.

The legislature, in enacting that the seat of government for the territory shall be and remain at Vancouver, exceeded the power conferred by the Organic Act to "change" the seat of government: The Seat of Government Case, 1 W. T. 115.

Act relating to Skamania County, page 44, statutes of 1866, are void, as not expressing the object in the title: Clarke County v. Brazee, 1 W. T. 199.

Murder committed on San Juan Island in 1869, during the joint occupancy between Great Britain and the United States, pursuant to convention entered into, pending settlement of international boundary line, is within the jurisdiction of the territorial courts: Watts v. United States, 1 W. T. 289.

Such place is not a place within the sole and exclusive jurisdiction of the United States, within section 3 of act of Congress of April 30, 1790: *Id.*

Sole and exclusive jurisdiction is not that exclusive of a state, as contradistinguished from a territory, but

**Constitutional Law** (continued).

rather as exclusive of local, state, or territorial jurisdiction: *Id.*

Establishment of a territorial government was implanting a new jurisdiction, which in relation to its people was, for the time being, to serve in lieu of, or for a purpose like that of, a state government: *Id.*

The fact that the United States, in taking possession of San Juan Island, had excluded territorial officers, did not displace the territorial jurisdiction, but suspended the execution of the territorial laws temporarily therein: *Id.*

Appellate jurisdiction "limited by law," prescribed in the Organic Act, means jurisdiction limited and regulated by territorial legislature, there being no limitation by the constitution, or by act of Congress subsequent to the Organic Act: *Nickels v. Griffin*, 1 W. T. 374.

Section 9 of the Organic Act, allowing appeals under such regulations as may be prescribed by law, precludes the regulation of appeals by any other than legislative rule: *Id.*

Territorial courts are not a part of the federal judiciary: *Id.*

The expression "laws of said territory" in Organic Act means such as had operative force in the territory at the time of the passage of the Organic Act; and "in other cases" means cases prescribed by territorial law: *Id.*

Hence appeals in cases arising under the laws of the territory must be made as provided by the laws of the territory: *Id.*

- "Laws of the United States," as referred to in the Organic Act, relates not only to statute laws, but all other rules of property and conduct forming the body of the law of the United States: *Phelps v. Steamship City of Panama*, 1 W. T. 518.

"Laws of the territory" include all the laws which the territory of Washington, considered as a political power subordinate to the general government, has authority to administer as emanating from itself: *Id.*

The laws of the United States distinguished from the laws of the territory, as the terms are used in the Organic Act: *Id.*

**Constitutional Law** (continued).

The line of separation between state and national power furnishes a reliable analogy between that of the nation and Washington Territory: *Id.*

How far maritime and admiralty law is a part of the body of the law of Washington Territory, when the same took effect, and how affected by the organization of the territory: *Id.*

In creating a territorial government, Congress is vested with full power, and may constitute the same in any form so long as republican: *Maynard v. Valentine*, 2 W. T. 3.

The phrase "rightful subjects of legislation," in the Organic Act of the territory of Oregon, defined, and held to include marriage and divorce as within the scope of power granted the legislature: *Id.*; *Maynard v. Hill*, 2 W. T. 321.

Under the Organic Act, the legislature might grant divorce by special act: *Id.*

And this though the defendant was out of the territory at the time: *Id.*

Act of the legislative assembly of 1879, providing a method for scaling logs, is not within the inhibition of section 1889, Revised Statutes of United States: *Crawford v. Cockran*, 2 W. T. 117.

An act of Congress relating to the territory is as much a law of the territory as if enacted by the territorial legislature: *Hill v. Washington*, 2 W. T. 147.

A retired officer of the United States belongs to the army within the meaning of the statutes of the United States, and as such cannot hold office in the territory: *Id.*

Repeal of the statute disqualifying such officer does not render his previous election to office valid: *Id.*

Game law extending to but five counties of the territory does not contravene the Organic Act of the territory, which forbids the territorial legislature from granting special privileges: *Hayes v. Territory*, 2 W. T. 286.

**Construction.** See Contracts; Deeds; Statutes; Wills.

**Contempts.** See Divorce.

Disobedience of witness to order requiring witnesses to be excluded during the examination of other witnesses



**Contempts (continued).**

may be punished as a contempt: *Hubbard v. Hubbard*, 7 Or. 42.

Counter-affidavit in proceeding for contempt is not a pleading, but evidence merely, and the facts alleged may be rebutted without formal replication: *State v. McKinnon*, 8 Or. 487.

Question of, is of fact merely, and will not be examined on appeal, except for errors of law or want of jurisdiction: *Id.*

Judge in vacation cannot determine charges of, in disobeying order of the court in term: *Id.*

**Continuance.** See Practice.

**Contracts.** See Admiralty; Assignments; Attachment; Bonds and Undertakings; Common Carriers; Complaints; Constitutional Law; Damages; Deeds; Husband and Wife; Joint and Several Liability; Sales; Specific Performance; Statute of Frauds.

1. CONSIDERATION.

2. CONSTRUCTION.

3. CONDITIONS AND DEPENDENT COVENANTS.

4. VALIDITY.

5. PERFORMANCE, AND WAIVER OF.

6. RIGHTS AND REMEDIES.

1. CONSIDERATION.

Promise to pay another's debt, founded on new consideration, subsisting liability of debtor no defense: *Hedges v. Strong*, 3 Or. 18; *Ludwick v. Watson*, 3 Or. 256.

Release of a doubtful claim sufficient to uphold counter-release of claim for damages: *Williams v. Poppleton*, 3 Or. 139.

Parol evidence admissible to prove actual consideration differing from that expressed in a receipt: *Id.*

Failure of consideration may be pleaded in action for unpaid assessment on stock of corporation: *Oregon Central R. R. Co. v. Scoggins*, 3 Or. 161.

Contract based on separate agreements involving different parties not valid unless by novation: *Shattuck v. Smith*, 5 Or. 125.

Forbearance, as consideration, must have been concerning a demand sustainable in law or equity: *Oregon etc. R. R. Co. v. Potter*, 5 Or. 228.

**Contracts (continued).**

Subscription to a college, containing a request express or implied which is complied with by the institution to its inconvenience or expense, is sustained by sufficient consideration: *Philomath College v. Hartless*, 6 Or. 158.

Promise by one party without a corresponding obligation by the other is void: *Corbitt v. Salem Gaslight Co.*, 6 Or. 405.

Consideration must be expressed in a written agreement for the sale of chattels over fifty dollars in value: *Id.*

Moral obligation unsupported by any pre-existing legal liability, no consideration: *Nine v. Starr*, 8 Or. 49.

A chattel mortgage is a good consideration for an agreement to make future advances: *McFadden v. Friendly*, 9 Or. 222.

Doubtful right abandoned or compromised is sufficient consideration: *Oregonian Railway Co. v. Wright*, 10 Or. 162.

Consideration for guaranty and contract to indemnify, by third party, need not be a benefit to himself: *Hildebrand v. Bloodsworth*, 12 Or. 75.

In pleading on a contract to pay for services, performance of the consideration must be alleged: *Weiner v. Lee Shing*, 12 Or. 276.

A consideration moving from C will sustain a promise by B to pay A money: *Baker and Smith v. Eglin*, 11 Or. 333; *Hughes v. Oregon R'y & Nav. Co.*, 11 Or. 437; *Schneider v. White*, 12 Or. 503; *Strong v. Kamm*, 13 Or. 172.

Stranger performing work on another's contract to excavate a street, by mistake, without the latter's knowledge, cannot recover the cost thereof: *Rohr v. Baker*, 13 Or. 350.

No recovery can be had for an act voluntarily done for the benefit of another without his request, unless he subsequently promise to pay: *Glenn v. Savage*, 14 Or. 567.

Voluntary payment of the debt of another does not create a cause of action in favor of the person so paying: *Williams & Co. v. Miller & Co.*, 1 W. T. 88.

Bare possession of anything of value, of which exclusive possession may possibly and lawfully be had, is prop-

**Contracts (continued).**

erty, and ordinarily its transfer or relinquishment is consideration for a contract: *Burch v. McDaniel and Johnson*, 2 W. T. 58.

**2. CONSTRUCTION.**

Agreement in writing for sale of articles to be counted out and delivered at future day is a contract to sell, and is not a sale: *Lownsdale v. Hunsaker*, 2 Or. 101.

Mere agreement to sell land does not constitute a license to purchaser to enter: *Lee v. Summers*, 2 Or. 260.

Reservation in sale of ferry franchise for free ferriage for grantor and his family construed to allow grantee free ferriage for his employees in any ordinary business: *Stephens v. Knott*, 2 Or. 304, overruling S. C., 3 Or. 50.

In construing a grading contract with city, estimate for excavation therein contained is *prima facie* correct as set forth: *Northrop v. Portland*, 3 Or. 258.

Contract to sell a farm, a town lot, and certain personal property for gross sum is not a severable contract: *Banks v. Crow*, 3 Or. 477; *Scheland v. Erpelding*, 6 Or. 258.

Whether entire or separable depends on intention, which is discovered from the language: *Southwell v. Beezley*, 5 Or. 458.

Warranties and representations in application for life insurance defined and construed: *Buford v. N. Y. Life Ins. Co.*, 5 Or. 334.

Contract for street improvement with a city, held not to limit the city's liability to pay, to amount realized from assessments on abutting property: *Frush v. City of East Portland*, 6 Or. 281.

Agreement conveying land, mill, etc., held to pass whatever is necessary for full enjoyment of mill privilege, and to permit raising the dam higher: *Brugger v. Butler*, 6 Or. 459.

It is for a court to construe a written agreement offered in evidence, not the jury: *State v. Moy Looke*, 7 Or. 54.

Parol evidence may connect the language of the written contract with subject-matter thereof indefinitely expressed: *Hannah v. Shirley*, 7 Or. 115.

Contemporaneous written agreements concerning the

**Contracts (continued).**

same matter are to be construed together: *Dean v. Lanham*, 7 Or. 422; *Kruse v. Prindle*, 8 Or. 158.

Contract to cut and deliver a quantity of logs, to be scaled and received in certain lots, held severable: *Tenny v. Mulvaney*, 8 Or. 129.

Promise to pay for services rendered by pauper or relative taken into the family is not implied: *Bennett v. Stephens*, 8 Or. 444.

Subsequent agreement to pay such person entitles her to recover reasonable value: *Id.*

Purchase of oats, not separated or identified, to be delivered, held an executory contract: *Hubler v. Gaston and Furry*, 9 Or. 66.

Where true import of the writing is doubtful, it is construed most strongly against the person using the language, in favor of one who has advanced money thereon: *McFadden v. Friendly*, 9 Or. 222.

Time held to be the essence of a contract giving broker commission to sell land in certain time: *Watson v. Brooks*, 11 Or. 271.

Contract to sell realty and retain all the proceeds above a certain sum, as commission, does not create a power coupled with an interest: *Simpson v. Carson*, 11 Or. 361.

Contract of guaranty and to indemnify, and contract of sale, both made the same day, are to be construed together: *Hildebrand v. Bloodsworth*, 12 Or. 75.

Word "sold" construed as "contracted to sell" in contract: *Id.*

Offer by letter need not be expressed in apt words of contract; any language from which the terms can reasonably be implied is sufficient: *Fisk v. Henarie*, 13 Or. 156.

Numbers of letters on the subject having passed between the parties, which leave the intention uncertain, evidence of prior understanding of the parties is admissible in construing: *Id.*

When the language of the contract will admit of it, justice and convenience incline to the construction of a simultaneous performance: *Powell v. D. S. & G. R. R. Co.*, 14 Or. 356.



**Contracts (continued).**

Rights of parties under a contract for leasing a band of sheep, where assignments were made of various interests, and liens claimed for advances under the contract: *Beezley v. Crossen*, 14 Or. 473.

Clause respecting interest being ambiguous, court rejected it in construing, rather than allow greater rate than the legal: *Hazard v. Maxon*, 1 W. T. 585.

Where, without doing violence to the language, an agreement is open to two interpretations, the one being fair to both parties, the other to but one party, the former will be preferred: *Hawley, Dodd, & Co. v. Kenoyer*, 1 W. T. 609.

Contract for sale of land upon payment by the vendee of certain sums, construed as giving vendor option on default of vendee to tender deed and sue for the money or to foreclose the rights of the vendee under the contract: *Wood v. Mastick*, 2 W. T. 64.

**3. CONDITIONS AND DEPENDENT COVENANTS.**

Before obligee can sue on contract to deliver him lumber of such dimensions as he may direct, he must allege and prove that he gave his obligor the necessary directions: *Baker v. Stoughton*, 1 Or. 227.

Agreement to be liable in certain contingency is not to be held to include contingency not named: *Failing v. Osborne*, 3 Or. 498.

Stipulation upon giving note that note is on condition of transfer to maker of a machine on maturity, held, that the transfer of the machine was not a condition precedent: *Hawley v. Bingham*, 6 Or. 76.

Delivery of personalty under an agreement for hiring at certain installments until the full price is so paid does not constitute a sale, and property does not pass until full payment: *Singer Mfg. Co. v. Graham*, 8 Or. 17; *Rosendorf v. Hirschberg*, 8 Or. 240.

Delivery of written contract not under seal may be shown to have been conditional by parol: *Simpson v. Carson*, 11 Or. 361.

Covenants to purchase certain property on or before five years, and that on such payment the other party will make good and sufficient deed, are dependent cove-

**Contracts (continued).**

nants: *Powell v. D. S. & G. R. R. Co.*, 12 Or. 488; S. C., 14 Or. 356.

Bill of sale of a vessel containing an express condition not to run on certain routes, held, that the condition was not a covenant, nor could it be shown to have been so intended by parol testimony: *Hale v. Finch*, 1 W. T. 566.

Contract to pass title to chattel after payment of its purchase price is by law regarded as if it read upon such payment: *Hawley, Dodd, & Co. v. Kenoyer*, 1 W. T. 609.

The promise on the one part cannot be enforced until that on the other part is performed: *Id.*

Such contract contains two mutual interdependent promises, the one being in consideration of the other, and conditional upon its performance: *Id.*

**4. VALIDITY.**

Note made on Sunday is void, but subsequent promise is sufficient to sustain *assumpsit*: *Smith v. Case*, 2 Or. 190.

Separable contract, in part bad, may be enforced as to valid part: *Murray v. Oliver*, 3 Or. 539; *Southwell v. Breezley*, 5 Or. 458.

Agreement to substitute another agreement is void, unless carried into execution, and accepted as satisfaction: *Smith v. Foster*, 5 Or. 44.

Agreement to convey land to agent of railway in consideration of his selecting certain route longer than one already surveyed, void: *Holladay v. Patterson*, 5 Or. 177.

Forbearance on such agreement no consideration for promissory note: *Oregon etc. R. R. Co. v. Potter*, 5 Or. 228.

Notwithstanding constitutional provision, husband and wife cannot contract with each other: *Elfelt v. Hinch*, 5 Or. 255.

Contract of foreign banking corporation, which has not recorded its power of attorney in the state, is void, and cannot be enforced by the corporation: *Bank of British Columbia v. Page*, 6 Or. 431.

**Contracts (continued).**

Promise of putative father to support bastard, void for want of consideration: *Nine v. Starr*, 8 Or. 49.

Wagers on elections are void as against public policy: *Willis v. Hoover*, 9 Or. 418.

Promise to clerk to pay illegal fees is void, and cannot be enforced: *Jackson v. Siglin*, 10 Or. 93.

Agreement in writing, and signed, but intended and considered as a mere form for an ulterior purpose, is not binding, and parol proof is admissible to show the facts: *Branson v. Oregonian R'y Co.*, 11 Or. 161.

City cannot subsequently modify a valid contract entered into for improvement of street, but after verdict, a complaint alleging such modification, denied by answer, will be held good: *N. P. L. & M. Co. v. East Portland*, 14 Or. 3.

Contract not to run steamboat on any of the waters of Oregon or California, and many of the navigable waters of Washington Territory, is void as against public policy: *O. S. N. Co. v. Hale*, 1 W. T. 283.

Indians' contracts are valid as those of any other alien, excepting executory contracts for the payment of money or goods paid or furnished by the United States to any tribe pursuant to treaty, prohibited by act of Congress: *Gho v. Jules*, 1 W. T. 325.

If the parties to a contract do not fix on a time for its performance, and the law cannot presume a time, the contract is void for uncertainty in that respect: *Hawley, Dodd, & Co. v. Kenoyer*, 1 W. T. 609.

Contract within the statute of frauds containing mutual promises, signed by but one of the parties, does not bind party not signing: *Id.*

Contracts for the sale of soldiers' additional homestead scrip are contrary to the policy of the act of Congress, and void: *Macintosh v. Renton*, 2 W. T. 121.

**5. PERFORMANCE, AND WAIVER OF.**

Agreement to convey free of encumbrances, grantor must put of record releases of any mortgages or other liens before he can tender deed: *Knighton v. Smith*, 1 Or. 276.

Refusal to comply with contract on a ground stated is a waiver of all other objections: *Id.*

**Contracts (continued).**

Defendant need not prove demand for performance where consideration fails or plaintiff has put it out of his power to perform the agreement: *McClane v. Thomas*, 1 Or. 288.

Vendor must tender deed, and vendee must tender price and make demand, before action lies: *Roberts v. Carland*, 1 Or. 353; *Powell v. D. S. & G. R. R. Co.*, 12 Or. 488; S. C., 14 Or. 356.

Mere readiness to pay, without tender and refusal to accept, insufficient: *Smith v. Foster*, 5 Or. 44; *Powell v. D. S. & G. R. R. Co.*, 12 Or. 488; S. C., 14 Or. 356.

Tender of performance must be made on the day, on contract to exchange land, or other party may elect to require money consideration and sue for same: *Shattuck v. Smith*, 5 Or. 125.

Time is not the essence of contract to convey at future day, unless clearly intended: *Knott v. Stephens*, 5 Or. 235; *Snider v. Lehnherr*, 5 Or. 385.

Where time is not material, either party may enforce by tendering execution on his part: *Id.*

Where time is the essence, injured party may, at his election, of his own motion, rescind: *Id.*

Personal indignities, etc., may be sufficient to prove breach of contract to support infirm person: *Tippin v. Ward*, 5 Or. 450.

When breach occurs by fault of party to be liable, deferred payments become due at once: *Monroe v. N. P. Coal Mining Co.*, 5 Or. 509.

Title being defective and there being an encumbrance on the land, contract to convey is not performed by tender of warranty deed: *Collins v. Delashmutt*, 6 Or. 51.

Where title is derived through unrecorded deed, title is defective, and vendee need not accept: *Id.*

To excuse performance by reason of new agreement, such agreement must have been entered into and accepted in satisfaction and extinguishment of former contract: *Watson v. Janion*, 6 Or. 137.

False representations, as an excuse, must have been relied upon, and actually misled defendant: *Dunning v. Cresson*, 6 Or. 241.

Where one party violates, he cannot avail himself of the



**Contracts (continued).**

contract against the others, and the latter may consider the contract rescinded: *Scheland v. Erpelding*, 6 Or. 258.

Offer in writing to pay is sufficient tender if declined, and such tender will operate to discharge a lien upon personality by chattel mortgage: *Bartel v. Lope*, 6 Or. 321.

Vendor need not remove heavy machinery from his shop to tender it at place of delivery, when vendee fails to perform or put himself in readiness to receive: *Smith Bros. v. Wheeler*, 7 Or. 49.

Actual delivery in such case is not necessary before suit: *Id.*

When plaintiff in breach of promise case need not allege or prove her demand for performance: *Lahey v. Knott*, 8 Or. 198.

Allegation that the work "was performed according to contract" is sufficient allegation of performance of condition under the Code: *Griffin v. Pitman*, 8 Or. 342.

Performance not alleged in complaint but alleged in answer, complaint is sufficient after verdict: *Turner v. Corbett*, 9 Or. 79.

Agreement by railroad company to pay certain sums by carriage of freight and passengers, being rendered impossible by the company by selling the road, becomes at once due in money: *Branson v. Oregon R'y Co.*, 10 Or. 278.

Tender in writing must be coupled with present ability to perform: *Ladd and Tilton v. Mason*, 10 Or. 308.

Grantee of legal title of land as security for payment must tender reconveyance before suing for the debt: *Wolcott v. Madden*, 10 Or. 370.

Breach of contract to build where owner reserved right to make certain alterations in the plans: *Savage v. Glenn*, 10 Or. 440.

Where time was the essence of a contract allowing broker to sell real property, and a purchaser is produced on the last day, but who demands time to examine title, there is no performance: *Watson v. Brooks*, 11 Or. 271.

When real estate broker brings purchaser according to the terms offered, he earns his commission: *Fisk v. Henarie*, 13 Or. 156.

**Contracts (continued).**

Owner of lands having offered by letter to broker sale at certain terms, performance according to the terms operates as an acceptance, without formal written answer: *Id.*

Where one gave his note for one thousand dollars currency, and received from the payee a contract that it should be valued at five hundred dollars if paid in coin, the note could not be discharged by the payment of five hundred dollars in currency, and the contract was a condition to be complied with, to be available: *Westbrook v. Chapman*, 1 W. T. 227.

**6. RIGHTS AND REMEDIES.**

An agreement tending to lead persons charged with a trust to betray it will not be enforced: *Holladay v. Patterson*, 5 Or. 177.

County is not liable upon implied contract to pay for improvements voluntarily put upon highway or bridge by private person: *Springfield Milling Co. v. Lane County*, 5 Or. 265.

On breach by one party, the other need not specify in his notice of rescission the breaches relied on: *Collins v. Delashmutt*, 6 Or. 51.

Failure to comply with contract, except for voluntary abandonment, does not preclude recovery for reasonable value of what has been done: *Steeple v. Newton*, 7 Or. 110; *Tribou v. Strowbridge*, 7 Or. 156; *Todd v. Huntington*, 13 Or. 9.

Damages specified and liquidated by the terms of the contract exclude all others: *Lung Louis & Co. v. Brown*, 7 Or. 326.

Conveyance in consideration of support will afford ground for relief to grantor by enforcing the contract and charging the land with such support: *Watson v. Smith*, 7 Or. 448.

Agreement, partly executed, to divide stream of water between land-owners may be enforced in equity, though not in writing: *Coffman v. Robbins*, 8 Or. 278.

Violation of contract with city, wherein employment of Chinese was prohibited or contract to be void, operates as forfeiture, and city need not resort to equity to annul: *Portland v. Baker*, 8 Or. 356.

**Contracts (continued).**

Money paid on illegal contract may be recovered before the contract is executed, but otherwise where the action operates as an affirmance of an executed contract: *Willis v. Hoover*, 9 Or. 418.

Where liability is joint and several, judgment at any stage of the action may be rendered against some of the defendants, and the action proceed as against other defendants: *Sears v. McCrew*, 10 Or. 48.

Person electing to sue his bailee, who has wrongfully pledged the former's goods, on the contract cannot recover for the conversion: *Nichols v. Gage*, 10 Or. 82.

Person relying on contract of married woman must allege and prove it to have been made within her powers to contract as a married women: *Wells v. Applegate*, 10 Or. 519.

When A, for a valuable consideration, agrees with B to pay his debt to C, the latter can enforce the contract against A: *Baker and Smith v. Eglin*, 11 Or. 333.

A party for whose benefit a contract is made can sue on it though it be under seal: *Hughes v. Oregon R'y & Nav. Co.*, 11 Or. 437; *Schneider v. White*, 12 Or. 503.

Demand not necessary in suing for reasonable worth of services: *Gibbs v. Davis*, 11 Or. 288.

In case of concurrent and dependent covenants, party alleging breach must allege a tender of performance at the time on his own part: *Powell v. D. S. & G. R. R. Co.*, 12 Or. 488; *S. C.*, 14 Or. 356; *Hawley, Dodd, & Co. v. Kenoyer*, 1 W. T. 609.

Upon a consideration moving from a third party, the promisor may be compelled by the promisee to perform, though the latter did not know of the promise when made: *Baker and Smith v. Eglin*, 11 Or. 333; *Hughes v. Or. R'y & Nav. Co.*, 11 Or. 437; *Schneider v. White*, 12 Or. 503; *Strong v. Kamm*, 13 Or. 172.

Stranger performing work on another's contract, without the latter's knowledge, by mistake, cannot recover the value from the latter: *Rohr v. Baker*, 13 Or. 350.

Acceptance of lumber under special contract precludes defense on the ground of its unmerchantable character, or its being different from that contracted for: *Williams & Co. v. Miller & Co.*, 1 W. T. 88.

Rights and remedies of consignee against carrier, on re-

**Contracts** (continued).

ceiving goods damaged in transit: *Williams v. Steamship Columbia*, 1 W. T. 95.

The right to make a valid contract, which an Indian possesses, draws after it the liability to be sued: *Gho v. Julles*, 1 W. T. 325.

No action can be maintained on a transfer of a contract to furnish supplies to the United States, such transfer being forbidden by law: *Turnbull and Jones v. Farnsworth*, 1 W. T. 444.

Party suing for a right acquired under a contract is presumed to have accepted under the contract what it was his interest to accept: *Bullene v. Garrison*, 1 W. T. 587.

Rights and remedies of vendee of chattels on breach of warranty of title: *Baker and Hamilton v. McAllister*, 2 W. T. 48.

Such vendee may pay off liens against the goods, and offset same against purchase price: *Id.*

Unlicensed liquor dealer cannot sue for damages for breach of contract to furnish him liquor to sell in violation of license law: *Bach, Messe, & Co. v. Smith*, 2 W. T. 145.

**Contribution.** See Suretyship; Warehousemen.

**Conversion.**

Complaint in conversion held insufficient to sustain judgment: *Johnson v. Oregon Steam Nav. Co.*, 8 Or. 35.

Defendants jointly liable, judgment against both must be given on general verdict: *Cauthorn v. King*, 8 Or. 138.

In an action against a sheriff for tax money converted to his own use, the fact that he was sheriff, and that he received money from individual tax-payers, is admissible evidence: *State v. Dale*, 8 Or. 229.

Money collected for taxes by sheriff is public money belonging to the county, for the conversion of which he may be indicted under section 559, Criminal Code (sec. 1772, *Hill's A. L.*): *Id.*

Special damages must be pleaded; what are special damages in conversion: *Salmon v. Olds and King*, 9 Or. 448.

Instructions on special damages irrelevant where such damages not pleaded: *Id.*

Agent is liable for conversion when he pledges his principal's goods for his own debt: *Nichols v. Gage*, 10 Or. 82.

Plaintiff electing to sue on the contract cannot recover as for the conversion: *Id.*



**Conversion (continued).**

Statute of limitations begins to run at time of conversion, and action must be begun within six years: *Sheppard v. Yocum and De Lashmutt*, 10 Or. 402.

Conversion of school funds by commissioners; suit for an accounting: *State v. Chadwick and Brown*, 10 Or. 425.

Mingling wheat with other wheat of same quality is not a conversion by a warehouseman: *Sears v. Abrams*, 10 Or. 499.

Conversion defined: *Ramsby v. Beazley*, 11 Or. 49; *Budd v. Multnomah St. R'y Co.*, 12 Or. 271.

Not necessary to maintain trover that defendant has actual or virtual possession of the property: *Id.*

Conversion by sheriff; plea of justification under a levy must allege ownership in the debtor: *Krewson v. Purdom*, 11 Or. 266.

In action for conversion by Indian agent in seizing a team transporting liquor within a reservation, what is a justification: *Webb v. Nickerson*, 11 Or. 382.

Subsequent return of the team to a person, not the one in possession at the time of seizure, claiming the ownership, is not an admission of wrongful taking: *Id.*

Trover will lie for the conversion of shares of stock in a corporation: *Budd v. Multnomah St. R'y Co.*, 12 Or. 271.

Defendants sued for joint tort are liable only when the conversion is proved to have been committed jointly: *Dahms v. Sears*, 13 Or. 47.

Sheriff and different attaching creditors are not liable jointly for several conversions in taking and attaching money of a prisoner: *Id.*

Plea of title in a third person in an answer is not new matter, and simply controverts allegations of ownership in complaint: *Krewson & Co. v. Purdom*, 13 Or. 563.

But *quære*, whether such fact can be proved under mere denial of plaintiff's title: *Id.*

Possession is sufficient evidence of title to maintain conversion: *Id.*

But *semble*, that possession alone is not sufficient to authorize recovery of value, unless it be an actual holding under claim of right: *Id.*

Sheriff having levied on personal property as belonging

**Conversion (continued).**

to one person may defend in action by another by showing the property belongs to a third party: *Id.*

Person sued by administrator for wrongfully taking goods of an estate may show in mitigation of damages that he used the proceeds to pay the debts of the estate: *Rutherford v. Thompson*, 14 Or. 236.

Different persons taking grain from warehouse at different times without concert of action cannot be joined in an action for conversion: *Cooper v. Blair*, 14 Or. 255.

Mortgagee of chattels may maintain trover against an assignee attempting to dispose of them contrary to the stipulations of the mortgage: *Case T. M. Co. v. Campbell*, 14 Or. 460.

In such action plaintiff need not show the amount due him; sufficient if he prove his qualified ownership and the conversion: *Id.*

**Conversations.** See Evidence.

**Conveyances.** See Deeds; Mortgages.

**Coroners.**

No stated fee for summoning jury: *Cook v. Multnomah County*, 8 Or. 170.

County Court has power to fix such fees, which power is discretionary, and not subject to review: *Id.*

Statute of 1854, allowing coroners in certain instances to perform the duties of sheriff, is still in force: *Rodolph v. Mayer*, 1 W. T. 133.

Record showing process to have been served by coroner, the court will presume, in the absence of a contrary showing, that the sheriff was laboring under some of the disabilities that make it incumbent upon the coroner to act in his stead: *Id.*

**Corporations.** See Common Carriers; Eminent Domain; Municipal Corporations; Railroads.

1. NATURE AND ORGANIZATION.
2. POWERS AND LIABILITIES.
3. OFFICERS AND AGENTS.
4. STOCK AND STOCKHOLDERS.
5. DISSOLUTION.

1. NATURE AND ORGANIZATION.

School districts are public corporations, and their corporate existence can only be annulled as provided by law

**Corporations (continued).**

under section 352 of the Code (sec. 355, Hill's A. L.):  
*State v. Hulin*, 2 Or. 306.

Before organization completed, corporation can receive subscriptions and sue on stock assessments: *Oregon Central R. R. Co. v. Scoggin*, 3 Or. 161.

Organization by the corporation subscribing for the majority of its stock is a nullity: *Holladay v. Elliott*, 8 Or. 84.

Corporations in organizing have no power to make regulations disposing of future profits, except by the articles of incorporation: *Coyote G. & S. M. Co. v. Ruble*, 8 Or. 284.

Corporators may receive and hold property for the use of the corporation to be formed: *Id.*

Constitution does not prohibit establishing of banks not issuing bills and notes to circulate as money: *State v. H. S. & L. A.*, 8 Or. 396.

Board of directors of the state university are a corporation, and may be sued without joining the state: *Dunn v. State University*, 9 Or. 357.

Counties are corporations, and may sue and be sued: *Crossen v. Wasco County*, 10 Or. 111.

**2. POWERS AND LIABILITIES.**

Must execute its deed with corporate seal, which may, however, be a scroll seal: *Eagle Woolen Mills Co. v. Monteith*, 2 Or. 277.

Corporator may sue his corporation: *Miller v. Oregon City Mfg. Co.*, 3 Or. 24.

Power to make and collect subscriptions and assessments on stock before complete organization: *Oregon Central R. R. Co. v. Scoggin*, 3 Or. 161.

Evidence of powers is now found in the general laws and the articles of incorporation: *Oregon Cascade R. R. Co. v. Bailey*, 3 Or. 164.

Corporation organized to transport on river and its portages is not limited to one side of river at portage: *Id.*

Corporation property held by it and necessary to its business is not liable to condemnation; but it has no exclusive right to property not necessary to its objects and business: *Id.*

**Corporations (continued).**

Power to purchase land was incident to corporations at common law: *Kelly v. People's Trans. Co.*, 3 Or. 189.

What is meant by power over property "necessary and convenient" to effect object: *Id.*

Corporation organized to make and sell lumber cannot hold mechanic's lien for labor in constructing building: *D. L. & M. Co. v. W. W. M. Co.*, 3 Or. 527.

Orders payable to bearer issued by and drawn on corporation are in effect its promissory notes, and are not *ultra vires*: *Fink v. Canyon Road Co.*, 5 Or. 301.

The tendency of modern decisions and presumptions is to assimilate the powers of private corporations to those of individuals and partnerships: *Id.*

Liable on simple contracts and for acts of their agents in the discharge of their duties: *Id.*

Corporation owning and operating canal and locks and steamboats thereon under state franchise is subject to reasonable legislative regulations requiring lists of freight and passengers passing the locks: *Board of Commissioners v. W. Tran. Co.*, 6 Or. 219.

Foreign banking corporations cannot transact business in Oregon without recording a power of attorney, and cannot enforce a contract made, unless they have complied with the laws: *Bank of British Columbia v. Page*, 6 Or. 431.

Corporations not of the class named in the title of the act, sections 7 and 8, page 617, *Miscellaneous Laws* (sec. 3272, *Hill's A. L.*), are not required to file a power of attorney before doing business in Oregon: *Singer M. Co. v. Graham*, 8 Or. 17.

Powers of corporation to appropriate county road as part of its toll road: *D. C. R. Co. v. C. & G. R. Co.*, 8 Or. 102; *C. & G. Road Co. v. Stephenson*, 8 Or. 263.

Proceedings of a corporation must be shown by its records: *Coyote G. & S. M. C. v. Ruble*, 8 Or. 284.

Unauthorized contract may be subsequently ratified expressly or impliedly by the corporation: *Branson v. Oregonian R'y Co.*, 10 Or. 278.

Property of corporation, not dividends, in the hands of a stockholder, is subject to execution on judgment against corporation: *Hughes v. Oregonian R'y Co.*, 11 Or. 158.



**Corporations (continued).**

Corporation holds its property in trust for its creditors and stockholders: *Branson v. Oregonian R'y Co.*, 11 Or. 161.

But though indebted, may sell its property; and purchaser in good faith for adequate consideration, knowing its indebtedness, does not become charged with payment of its debts: *Id.*

The taking of a note for a premium in Washington Territory, by a resident agent of a foreign insurance company, is "doing insurance business" in Washington Territory by such company; though merely receiving and forwarding an application for insurance for acceptance or rejection by such company in another state is not: *Hacheny v. Leary*, 12 Or. 40.

Such note is void, where the company has not complied with the statute regulating power of foreign insurance companies: *Id.*

Principle denying corporation's power to be a partner: *Hackett v. Multnomah R'y Co.*, 12 Or. 124.

Corporation may be a joint owner with an individual in a ferry franchise, and be entitled to an accounting for its share of the earnings: *Id.*

Corporation has no powers other than the statute confers, or such as are incidental: *Lakin v. Railroad Co.*, 13 Or. 436.

Unless specially authorized by statute, railroad corporation cannot lease its road and so escape liability for torts, though committed by the lessee: *Id.*

Construction company having control of and operating railroad for the owners, the latter are liable for injury occasioning death, though the use of the road was without their consent: *Id.*

Corporation cannot avail itself of the services of a person, and then screen itself from liability on the ground that it never passed an ordinance on the subject: *Tyler v. T. of T. A. & P. U.*, 14 Or. 485.

Railroad, though incorporated under a special act, may proceed to condemn lands under the general act relating to corporations: *Cascades R. R. Co. v. Louis Sohns*, 1 W. T. 557.

**Corporations (continued).****3. OFFICERS AND AGENTS.**

Directors cannot in their own names execute deed for and in behalf of corporation; it must be the corporation's deed executed by the corporation: *Eagle Woolen Mills Co. v. Monteith*, 2 Or. 277.

President is proper officer to confess judgment against corporation if duly authorized: *Miller v. Bank of British Columbia*, 2 Or. 291; *Miller v. Oregon City Mfg. Co.*, 3 Or. 24.

Director not bound by vote of majority where he claims on contract against the corporation: *Hedges v. Strong*, 3 Or. 18.

Fraud of directors not reviewed in equity unless there be cause for removal and to wind up the corporation: *Hedges v. Paquett*, 3 Or. 77.

If not prevented by the by-laws, directors may fix their own compensation, and may pass upon other questions in which the individual director has an interest: *Id.*

But such acts are not conclusive, and are voidable, not void, and one who seeks to set them aside must show injury: *Id.*

President of railroad company cannot mortgage locomotive under corporate seal without express authority: *Luse v. Isthmus Transit R'y Co.*, 6 Or. 125.

Note payable to "treasurer of Philomath College" inures to the benefit of the corporation: *Philomath College v. Hartless*, 6 Or. 158.

Deed sealed with the corporate seal, and subscribed by the president and secretary, declaring that they subscribe it for the corporation, passes title: *Moore v. Willamette T. & L. Co.*, 7 Or. 359.

Service of summons on agent is substituted service, and must show the facts which confer jurisdiction: *Caro Bros. v. O. & C. R. R. Co.*, 10 Or. 510.

Person cannot be the agent of a corporation in making a purchase before the corporation exists: *Kelly v. Ruble*, 11 Or. 75.

Person signing note with his name, and adding "Pres." or "Sec.," is personally bound: *Guthrie v. Imbrie*, 12 Or. 182.

But officers signing their names and affixing corporate seal with the name of the corporation thereon, binds the corporation: *Id.*

**Corporations (continued).**

The fact that the same person acted as a chairman and secretary of meeting of board of trustees will not invalidate the proceedings: *Budd v. W. W. P. & P. Co.*, 2 W. T. 347.

Not essential to legality of an unstated meeting of trustees that proof of notice thereof be spread upon the records, such proof may be supplied *aliunde*: *Id.*

Until the contrary appear, such meeting will be presumed regularly called: *Id.*

Fact that trustee who had a claim against corporation was present at meeting of trustees which gave the note of the corporation in payment will not render the note void: *Id.*

In absence of statute, trustee can contract with corporation through the board of trustees, though he is present at the meeting: *Id.*

**4. STOCK AND STOCKHOLDERS.**

Corporation may receive subscriptions to stock, and sue for assessments before being fully organized: *Oregon Central R. R. Co. v. Scoggin*, 3 Or. 161.

As soon as one half of the stock is subscribed, and directors elected, stock may be increased: *Willamette Freighting Co. v. Stannus*, 4 Or. 261.

Subscription to all the stock is unnecessary before assessments may be levied: *Id.*

Stockholder present and assenting to adoption of by-law by stockholders, and not adopted by the board of directors, levying assessment, is estopped to deny legality of the levy: *Id.*

Entry by agent of name of principal in a stock list, without subscribing the principal's name to subscription list or stock-book by him as agent, does not bind principal as a stockholder: *Grangers' M. Co. v. Vinson*, 6 Or. 172.

Where a bare subscription is relied on to show a person a stockholder, the subscription itself should contain enough to show his intention to subscribe for the stock: *Grangers' Market Co. v. Vinson*, 6 Or. 172; *Coyote G. & S. M. Co. v. Ruble*, 8 Or. 284.

Purchaser is liable for unpaid balance due on stock purchased, when duly demanded by directors: *Bush v. Cartwright*, 7 Or. 329.

**Corporations (continued).**

Assignor of stock is liable, when after due demand the purchaser fails to pay such balance: *Id.*

Creditor has no remedy against stockholder until his remedy against the corporation is exhausted: *Id.*

Stockholder's liability is in equity, where all creditors and stockholders may be made parties: *Bush v. Cartwright*, 7 Or. 329; *Hodges and Wilson v. Silver Hill Mining Co.*, 9 Or. 200.

Stockholders may direct the sale and manner of selling the realty on dissolution: *Moore v. Willamette T. & L. Co.*, 7 Or. 359.

On organizing, corporation cannot subscribe for its own stock: *Holladay v. Elliott*, 8 Or. 84.

Minority of stock only being subscribed, stockholders cannot organize and elect directors: *Holladay v. Elliott*, 8 Or. 84; *Coyote G. & S. M. Co. v. Ruble*, 8 Or. 284.

Person may be a corporator who is not a stockholder: *Id.*

Stockholder is liable for assessment only when the records show the assessment was made by the directors: *Id.*

Agreement made by stockholder before organization must be adopted by the corporation or the directors after their election to become binding: *Id.*

Subscription to half the stock must be made before the corporation can be organized: *Id.*

To be liable as a stockholder person must have signed or expressly authorized an agent to sign stock-book: *Id.*

Original stockholders are made liable only by their written subscriptions, and there is no estoppel between them: *Id.*

Agreement, made before organization, to subscribe, does not authorize directors afterward to put the person's name on the stock-list: *Id.*

In action by corporation to recover subscriptions, conditions of the subscription may be inquired into, and there is no estoppel: *Id.*

Stockholder purchasing mining property for the corporation may be held a trustee, and required to convey to the corporation: *Id.*

*Mandamus* does not generally lie to compel transfer of stock on the corporation books: *Durham v. Monumental S. M. Co.*, 9 Or. 41.



**Corporations (continued).**

Remedy for refusal to transfer stock on the stock-books is by action at law for damages: *Id.*

Stockholder liable in equity where the corporation is insolvent, although judgment and a return of *nulla bona* is not obtained against the corporation: *Hodges and Wilson v. Silver Hill Mining Co.*, 9 Or. 200.

Liability of stockholders is several and limited: *Id.*

Where it is made to appear that some are insolvent, the solvent stockholders must pay the amount of liability of the insolvent: *Id.*

Liability extends only to those who are or have been holders of the legal title of unpaid stock: *Branson v. Oregonian R'y Co.*, 10 Or. 278; *S. C.*, 11 Or. 161.

Agent purchasing stock and taking the legal title thereto in his own name, for the benefit of his principal, must be indemnified by the latter for liabilities thereon: *Id.*

Trover lies for conversion of shares of corporate stock: *Budd v. Multnomah St. R'y Co.*, 12 Or. 271.

In a suit by creditors to hold stockholders individually liable, it is not necessary to make all the creditors or all the stockholders parties: *Brundage v. Mon. G. & S. M. Co.*, 12 Or. 322.

In such suit, if a defendant stockholder wants other stockholders made defendants he must bring them in at his own expense, by answer, or other proceeding: *Id.*

But in a suit to wind up an insolvent corporation, all creditors and stockholders should be made parties: *Id.*

Directors owning all the stock, at a meeting where all were present, three transferred all their stock to the remaining two; held, purely individual transaction, notwithstanding all were officers: *Mays v. Foster*, 13 Or. 214.

In the absence of proof to the contrary, a transfer of stock to an individual cannot be held to be a transfer to the company: *Id.*

Stockholder subscribing on condition, to take advantage of failure to comply with the condition should promptly require subscription canceled: *Lee v. Imbrie*, 13 Or. 510.

Such conditional subscriber may be held liable as a stockholder, where by his acts he has waived the condition: *Id.*

**Corporations (continued).**

Unpaid subscriptions constitute a fund upon which creditors can rely: *Id.*

**5. DISSOLUTION.**

Appeal does not lie from refusal of Circuit Court to grant leave to bring action to vacate charter: *State v. Oregon Central R. R. Co.*, 2 Or. 255.

Consent of governor necessary to authorize proceeding to annul corporate existence of school district: *State v. Hulin*, 2 Or. 306.

Remedy is by action in the name of the state, where corporation usurps franchises: *Kelly v. People's Trans. Co.*, 3 Or. 189.

The dissolution and disposition of the corporate property is controlled by the stockholders: *Moore v. Willamette T. & L. Co.*, 7 Or. 359.

**Costs and Disbursements.** See Attorneys; Bills and Notes; Compensation; Fees.

1. ALLOWANCE OF COSTS.

2. TAXATION OF COSTS.

3. RIGHTS AND REMEDIES.

**1. ALLOWANCE OF COSTS.**

If plaintiff fails to recover fifty dollars in an action for damages, he recovers no costs unless the failure results solely from counterclaim or set-off, in which case costs follow the judgment: *Roberts v. Carland*, 1 Or. 332.

Judgment against prosecuting witness for costs in preliminary examination before magistrate is void: *McDonald v. Crusen*, 2 Or. 259.

The covenantee under a deed, in action on the covenant, having been ousted, cannot recover for costs incurred by him in defending in an action after eviction: *Stark v. Olney*, 3 Or. 88.

Allowance discretionary, where on appeal from Justice's Court, less is recovered than the judgment obtained below: *Hollister v. Hagui*, 3 Or. 319.

Tender must be made before suit is commenced, to carry costs: *Oregon Central R. R. Co. v. Wait*, 3 Or. 428.

Costs can in no action at law be awarded to both parties: *McDonald v. Evans*, 3 Or. 474.

Costs in an action of replevin, where defendant recovers part of the goods: *Id.*

**Costs and Disbursements** (continued).

Costs in an action to recover real property: *Crossman v. Lander*, 3 Or. 495.

Cannot be allowed to either party in contested election case, not being expressly authorized by statute: *Wood v. Fitzgerald*, 3 Or. 568.

Trial fee must be paid by appellant on appeal: *Bailey v. Frush*, 5 Or. 136.

Upon affidavit that party is not able to pay, trial fee is not required: *Id.*

Court may dismiss appeal on non-payment of trial fee: *Id.*

On appeal from Justice's Court, section 542 (sec. 552, Hill's A. L.) governs costs, and section 539 (sec. 549, Hill's A. L.) applies only to cases originally begun in Circuit Court: *Nurse v. Justus*, 6 Or. 75; *Burt v. Ambrose*, 11 Or. 26.

Under subdivision 1 of section 539 of the Code (sec. 549, Hill's A. L.), party recovering judgment in action for nuisance, where the title and right of possession of realty is put in issue, is entitled to costs: *Bentley v. Jones*, 7 Or. 108.

What is an open mutual account, within subdivision 3, section 539, Civil Code (sec. 549, Hill's A. L.), relating to costs: *Hayden v. Waymire*, 10 Or. 367.

Plaintiff in replevin on appeal from County Court cannot recover more costs than damages in the Circuit Court, unless he prove the value of the goods, and his damages to be greater than the sum of fifty dollars: *Burt v. Ambrose*, 11 Or. 26.

Assignor bringing suit for an accounting against his assignees is not entitled to costs, unless he tenders the balance due the creditors: *Kinney v. Heatley*, 13 Or. 35.

In such suit assignees cannot recover attorney's fees, when they have sufficient property in their hands to pay the creditors, beyond the statutory costs: *Id.*

Where a plaintiff in a divorce case failed to prove her case, she was nevertheless awarded costs, the defendant not being without fault, and having property partly earned by the plaintiff: *Bender v. Bender*, 14 Or. 353.

In an action against two or more defendants who do not

**Costs and Disbursements (continued).**

sever their defense, but one bill of costs can be allowed under section 541 of the Civil Code (sec. 551, Hill's A. L.): *Tyler v. T. of T. A. & P. U.*, 14 Or. 485.

Omission to decree costs in admiralty does not prevent the decree from being final: *Sloop Leonede v. United States*, 1 W. T. 153.

Such omission is presumptive that the court did not intend to decree costs, the allowance of costs being largely within the discretion of a court of admiralty: *Id.*

Where husband who began suit against his wife for divorce was ordered by the court to pay in a sum of money to enable wife to defend, and subsequently he dismissed the suit, judgment for costs and expenses of wife, including counsel fees, is properly rendered against him: *Thorndike v. Thorndike*, 1 W. T. 175.

Such expenses are contemplated by the divorce act, and may be allowed by the court in any disposition it may make of the case: *Id.*

Dismissal of the action having obviated trial, the Supreme Court reduces the amount of counsel fees allowed, but the other costs, being peculiarly within the knowledge of the lower court, are allowed to stand: *Id.*

An encumbrance of the record on error with superfluous matter should be punished by the imposition of costs: *King County v. Collins and Condon*, 1 W. T. 469.

Where judgment is affirmed as to one of the appellees, such appellee is entitled to costs to the extent of the statutory attorney's fee and disbursements for brief against the appellant, but not against his sureties: *Wiley v. Morrow*, 1 W. T. 475.

Where a suit is brought in the District Court that might have been brought before a justice of the peace, costs are not recoverable, unless judgment be for over one hundred dollars: *Bagley v. Carpenter*, 2 W. T. 19, overruling *Ebey v. Engle and Hill*, 1 W. T. 72.

And in such case the test of jurisdiction is not the sum recovered, but the sum claimed: *Id.*

Allowance of attorneys' fees in a suit to foreclose a mechanic's lien: *Seattle & W. W. R. R. Co. v. Ah Kow*, 2 W. T. 36.



**Costs and Disbursements (continued).****2. TAXATION OF COSTS.**

Mileage will not be allowed for witnesses beyond the state line: *Crawford v. Abraham*, 2 Or. 163.

Mileage and attendance must be actual, but may be taxed, although witness attends without subpoena: *Id.*

Must be for miles actually traveled, and days of attendance as witnesses only: *Id.*

Allowed to witness within the state beyond reach of subpoena: *Id.*

But one claim for mileage and attendance of same witness at same term, in two or more cases between the same parties can be made: *Id.*

Cost bill must be verified as a pleading, and, on objection made, amended bill must be filed: *Id.*

Each item in cost-bill must be separately stated: *Wilson v. Salem*, 3 Or. 483; *Cross v. Chichester*, 4 Or. 114.

Practice on filing of objections to cost-bill; what amended verified statement must contain: *Id.*

What sufficient verification of cost-bill: *Cross v. Chichester*, 4 Or. 114.

Additional cost-bill cannot be filed after satisfaction of judgment, and execution issued for additional costs: *Snipes v. Beezley*, 5 Or. 420.

Amount of costs need not be stated in the judgment, and may be taxed by the clerk from the records and papers on file: *Huntington v. Blakeney*, 1 W. T. 111.

**3. RIGHTS AND REMEDIES.**

Decision of Circuit Court determining the amount of costs may be reviewed: *Cross v. Chichester*, 4 Or. 114.

Right of action on undertaking for costs does not pass to assignee of justice's judgment by virtue of the assignment of the judgment: *Dray v. Mayer*, 5 Or. 185.

Judgment for costs and disbursements is left in full force in a criminal case, on abatement of appeal by the death of defendant and the lien of the state on the defendant's lands continues: *Whitley v. Murphy*, 5 Or. 328.

Judgment for, in criminal case, may be enforced as in a civil action: *Id.*

Relief granted against fraudulent taxation of costs in criminal case may be granted upon a proper showing: *Id.*

**Costs and Disbursements** (continued).

Assignment of costs to attorney after verdict and before judgment is valid and will prevent right of set-off against the judgment which would otherwise exist: *Ladd and Bush v. Ferguson and McFadden*, 9 Or. 180.

Appeal from judgment awarding costs, or from order fixing the amount of costs recoverable, when each is proper: *Burt v. Ambrose*, 11 Or. 26.

Injunction does not lie to prevent issuing an execution to enforce an erroneous judgment for costs; appeal is the proper remedy: *Nicklin v. Hobin*, 13 Or. 406.

Where costs have been improperly taxed, the remedy is by retaxation in the District Court: *Newberg and Abrams v. Farmer*, 1 W. T. 182.

**Co-tenancy.** See Tenancy in Common.

**Counsel.** See Attorneys.

**Counterclaims.** See Set-off and Counterclaims.

**Counterfeiting.**

Punishment rests exclusively with courts of United States: *State v. Brown*, 2 Or. 221.

But state legislatures may make it an offense punishable by state courts to have implements for counterfeiting in possession, and such offense is not counterfeiting: *Id.*

**Counties.** See Paupers; Taxation.

Liability for injury occasioned by defective bridge: *McCalla v. Multnomah Co.*, 3 Or. 424.

Road supervisor is agent of; liability for his negligence: *Id.*

Cannot pre-empt land for seat of justice under act of Congress of May 26, 1824: *Whitlow v. Reese*, 4 Or. 335.

Can recover money illegally claimed by and paid to officer for his services: *Grant Co. v. Sels*, 5 Or. 243.

When suit brought in the wrong county, the objection is avoided by changing the venue by order of court before time to answer: *Weiss v. Bethel*, 8 Or. 522.

Counties are bodies politic; may sue and be sued: *Crossen v. Wasco Co.*, 10 Or. 111.

Can accept service and waive copy of notice of appeal through county clerk: *Read v. Benton Co.*, 10 Or. 154.

When action lies against county for payment of claims: *Cook v. Multnomah Co.*, 8 Or. 170; *Mountain v. Multnomah Co.*, 8 Or. 470; *Crossen v. Wasco Co.*, 10 Or.

**Counties (continued).**

111; *Pruden v. Grant Co.*, 12 Or. 308; *Wood v. Riddle*, 14 Or. 254; *Vincent v. Umatilla Co.*, 14 Or. 375.

County must be made party on review of acts of county court in transaction of county business: *Wood v. Riddle*, 14 Or. 254.

Legislature has full power to apportion counties, and adjust their common burdens: *Morrow Co. v. Hendryx*, 14 Or. 397.

The act for the organization of Morrow County construed: *Id.*

When a new county is created out of an old one, the latter takes the county property, and becomes liable for all the county debts, in the absence of express legislation: *Gilliam Co. v. Wasco Co.*, 14 Or. 525.

In such case the old county may be compelled to pay the whole of the state levy of taxes charged upon the county at the time of separation: *Id.*

Requisites of a complaint to charge a county for maintenance of a pauper: *Collins v. King Co.*, 1 W. T. 416.

Account in such case must have been presented to and disallowed by board of commissioners before action lies: *Id.*

County is not a proper party to proceedings instituted to compel the individual members of board of commissioners to perform duties devolving on them by law, not as a board, but as members thereof: *Kitsap County v. Carson*, 1 W. T. 419.

In such proceedings, county cannot sue out a writ of error: *Id.*

Liability of a county for care of paupers: *King County v. Collins and Condon*, 1 W. T. 469.

**County Clerk.** See Appeal and Error; Bonds and Undertakings; Costs and Disbursements; Elections; Fees; Officers.

Duties are not only ministerial, but *quasi* judicial: *State v. Smith*, 1 Or. 250.

Appointment of deputy with powers to act for him must be authorized by law: *Id.*

Has power to enter defaults without judicial direction, under the Code: *Graydon v. Thomas*, 3 Or. 250; *Crawford v. Beard*, 12 Or. 447.

**County Clerk** (continued)

In so doing he exercises ministerial, not judicial, functions: *Id.*

Deputy county clerk under territorial act of 1856 was an independent officer: *Willamette Co. v. Gordon*, 6 Or. 175.

His official signature was "deputy clerk," and his duties were distinct from those of the clerk: *Id.*

Bond being lost, equity will administer complete relief against sureties in favor of one damaged by clerk's acts: *Howe v. Taylor*, 6 Or. 284; *S. C.*, 9 Or. 288.

Parol proof of contents and the names of the sureties on such bond is admissible when the original is lost and the record copy destroyed: *Howe v. Taylor*, 9 Or. 288.

Liability of the clerk and his sureties for failure to record a mortgage: *Id.*

Not entitled to commission on money bid at execution sale, not actually coming into his hands: *Jackson v. Siglin*, 10 Or. 93. •

Can accept service and waive copy of notice of appeal for the county as respondent: *Read v. Benton County*, 10 Or. 153.

Duty to make out and deliver to sheriff notices of election may be enforced by *mandamus*: *State v. Ware*, 13 Or. 380.

**County Commissioners.** See Appeal and Error; Bridges; County Court; Ferries; Highways; Judgments and Decrees; Mandamus; Parties; Paupers.

**County Court.** See Administration; Administrators and Executors; Bridges; Counties; Courts; Ferries; Highways; Judgments and Decrees; Jurisdiction.

Cannot establish ferry for one year; such order is void: *Cason v. Stone*, 1 Or. 39.

Can only establish perpetual ferries, and grant perpetual licenses: *Id.*

County court sitting as county commissioners is a tribunal of limited and inferior jurisdiction: *Ruckles v. State*, 1 Or. 347; *Wren v. Fargo*, 2 Or. 19.

Has no authority to require sheriff to give new bond on pain of vacating his office: *Id.*

Nor after approving sheriff's bond, of its own motion disapprove the same: *Wren v. Fargo*, 2 Or. 19.



**County Court (continued).**

Certificate of, on appeal, in case wherein title to real property came in issue, is sufficient compliance with statutory requirement to certify such case to Circuit Court, and judgment is not void: *Gird v. Morehouse*, 2 Or. 53.

Authority of, over assessment roll: *Oregon Steam Nav. Co. v. Wasco Co.*, 2 Or. 206; *Rhea v. Umatilla Co.*, 2 Or. 298; *Darragh v. Bird*, 3 Or. 246.

No authority to determine what persons are entitled to the realty, and to partition the estate of decedent: *Hanner v. Silver*, 2 Or. 336.

In probate matters, is a court of superior jurisdiction: *Russell v. Lewis*, 3 Or. 380; *Tustin v. Gaunt*, 4 Or. 305; *Monastes v. Catlin*, 6 Or. 119.

Jurisdiction and powers under act of 1868 (c. 39, tit. 1, Hill's A. L.) in regard to ditches: *Seely v. Sebastian*, 4 Or. 25.

Is a court of record; limited jurisdiction in laying out roads: *Johns v. Marion County*, 4 Or. 46; *State v. Officer*, 4 Or. 180; *C. & G. Road Co. v. Douglas County*, 5 Or. 280.

Record must show affirmatively that it has acquired jurisdiction to lay out the road: *State v. Officer*, 4 Or. 180; *Tompkins v. Clackamas County*, 11 Or. 364.

Record in probate matters is entitled to presumptions of regularity, and cannot be impeached collaterally: *Tustin v. Gaunt*, 4 Or. 305.

Has no jurisdiction to try questions of title or eminent domain: *C. & G. Road Co. v. Douglas County*, 5 Or. 280.

Review lies to Circuit Court upon its proceedings in laying out a road: *Id.*

Speaks only by its journal, and a contract with county can only be proved thereby: *Douglas County Road Co. v. Abraham*, 5 Or. 318.

Supervisory control of Circuit Court over, to require completion of the record, is exercised by *mandamus*, appeal, or review, not injunction: *Road Co. v. Douglas County*, 5 Or. 373.

In appointing guardian for minors and lunatics, is a court of superior jurisdiction: *Monastes v. Catlin*, 6 Or. 119.

**County Court (continued).**

Such jurisdiction pertains to probate court within article 7, section 12, of the constitution: *Id.*

Has exclusive jurisdiction in probate of wills: *Willamette County v. Gordon*, 6 Or. 175; *Hubbard v. Hubbard*, 7 Or. 42; *Brown v. Brown*, 7 Or. 285.

Is not liable for compensation of a jailer appointed by the sheriff: *Crossen v. Wasco County*, 6 Or. 215.

Order denying petition for road no bar to subsequently laying out road over same route: *Scheland v. Erpel-ding*, 6 Or. 238.

May appoint special terms at which any business may be transacted: *Id.*

Has power to employ attorneys to represent the county in proceedings by or against it: *Van Sant v. Portland*, 6 Or. 394.

Order of distribution of personalty of deceased persons is final unless appealed from: *Winkle v. Winkle*, 8 Or. 193.

Has exclusive jurisdiction in matters pertaining to transfer of the title to personalty of deceased persons: *Id.*

Has power to make agreement with private corporation for appropriation of a county road: *D. C. R. Co. v. C. & G. R. Co.*, 8 Or. 102.

Has power to assess damages for taking material by road supervisor from adjoining land to repair roads: *Kendall v. Post*, 8 Or. 141.

Allowing fees to coroner, for summoning jury, discretionary: *Cook v. Multnomah County*, 8 Or. 170.

Duty of the County Court to provide armory for militia company: *Mountain v. Multnomah County*, 8 Or. 470; *Vincent v. Umatilla County*, 14 Or. 375.

Decision in allowance of claims, where the statute prescribed the duty, and a judicial function is exercised, is subject to writ of review: *Id.*

Has jurisdiction in proceeding to contest a will, and to revoke letters testamentary: *Heirs of Clark v. Ellis*, 9 Or. 128.

Auditing and allowing claim of fees of officers fixed by law is not a judicial decision subject to review: *Crossen v. Wasco County*, 10 Or. 111.

Such duties are distinguished from duty of auditing and

**County Court (continued).**

allowing claims under a statute investing the court with special or discretionary powers therefor: *Id.*

Judicial functions in transacting business as financial agent of the county, and in auditing and allowing fees of officers, are not essential for that purpose, and cannot be implied: *Id.*

Court has no power to permit corporation to establish toll-gate on highway at a point not on its corporate road: *State v. Douglas County Road Co.*, 10 Or. 185.

In exercising probate powers to sell real property of the estate of a deceased person, its jurisdiction depends upon the sufficiency of the petition: *Wright and Jones v. Edwards*, 10 Or. 298.

No jurisdiction to sell is acquired where the petition is not strictly in accordance with the statute: *Id.*

Jurisdiction to settle accounts of administrator, and determine the amount of his liability to the estate, is exclusive: *Hamlin v. Kinney*, 2 Or. 91; *Adams v. Petrain*, 11 Or. 304.

Statute requiring certain proceedings at "next ensuing" term refers to regular term, not special: *Tompkins v. Clackamas County*, 11 Or. 364.

Term appointed by county judge, record not showing commissioners present and concurring, is irregular, and an order establishing road then made is void: *Id.*

Court cannot by *nunc pro tunc* order validate void order, against the rights of parties who have not had a hearing: *Id.*

Jurisdiction in granting and revoking letters of administration is exclusive in the first instance: *Ramp v. McDaniel*, 12 Or. 108.

Powers in probate matters are not created by statute: *Id.*

In auditing bills, where statute does not fix the amount to be allowed, the court acts judicially, and its judgment cannot be reviewed except for error of want of jurisdiction: *Cook v. Multnomah County*, 8 Or. 170; *Mountain v. Multnomah County*, 8 Or. 470; *Crossen v. Wasco County*, 10 Or. 111; *Pruden v. Grant County*, 12 Or. 308; *Vincent v. Umatilla County*, 14 Or. 375.

**County Judge.** See *County Court*; *Judges*.

Elected holds for four years, except in case of death or resignation: *State v. Johns*, 3 Or. 533.

**County Judge (continued).**

Power to repair bridges in cases of emergency: Springfield Milling Co. v. Lane County, 5 Or. 265.

Money illegally received by, under claim for salary, may be recovered by county: Grant County v. Sels, 5 Or. 243.

**County Seat.**

Act of 1868, changing county seat of Umatilla County, is constitutional: Simpson v. Bailey, 3 Or. 515.

Act of 1872, changing county seat of Union County, is constitutional: McWhirter v. Brainard, 5 Or. 426.

Submitting to vote the place of change is not unconstitutional as delegating legislative power: Id.

*Mandamus* the remedy for contesting such vote, not injunction: Id.

**County Treasurer.**

Not liable for money, in action for money had and received, paid to county and mingled with county funds: Trainor v. Multnomah County, 2 Or. 214.

Re-enacting the law fixing his salary does not deprive him of the right to a percentage for receiving school funds, allowed to him by another statute not referred to in the re-enactment: Chatfield v. Washington County, 3 Or. 318.

**Courses and Distances.** See Boundaries.**Courts.** See Circuit Courts; County Court; Judges; Judgments and Decrees; Jurisdiction; Rules of Court; Terms of Court.

Every court has power to control its own process and prevent its abuse: Provost v. Millard, 3 Or. 370.

May make reasonable rules for the conduct of business before them: Carney v. Barrett, 4 Or. 171.

*Nunc pro tunc* order, when refusal discretionary, and when not: Road Co. v. Douglas County, 5 Or. 406.

Territorial Probate Court was a court of inferior and limited jurisdiction: Farley v. Parker, 6 Or. 105.

Every court has power to amend its record to make it show the actual facts determined, and such amendment is not open to collateral attack: Harvey's Heirs v. Wait, 10 Or. 117.

But having lost power to change previous decision, its alterations at a subsequent term are void: Id.



**Courts (continued).**

Constitutionality of act of 1878 (sec. 2287, Hill's A. L.), providing for the election of the judges of the Supreme and Circuit Courts in district classes, decided: Cline and Newsome v. Greenwood and Smith, 10 Or. 230.

Every court has power to vacate its decrees made without jurisdiction, whether at same or subsequent term: Ladd and Tilton v. Mason, 10 Or. 308.

At any time when the rights of third parties have not intervened, a court may amend its records by *nunc pro tunc* order to make it conform to the truth: Carter, Rice, & Co. v. Koshland, 12 Or. 492.

Under section 911 of the Code (sec. 940, Hill's A. L.), courts have power to adopt any suitable procedure, when there is none pointed out by statute, conformable to the Code: Aiken v. Aiken, 12 Or. 203; Carter, Rice, & Co. v. Koshland, 13 Or. 615.

Act of Congress of 1856, limiting times and places of holding courts, does not affect jurisdiction, but designates time and place of its exercise: Leschi v. Territory, 1 W. T. 13.

Until designation of the times and places of holding the courts is made by the judges under that act, the laws of the territory on the subject control: *Id.*

Organization and jurisdiction of the courts of Washington Territory considered: *Id.*

*Quære*, whether amendment 6 to the United States constitution applies to territorial courts: *Id.*

Act of Congress, August 16, 1856, regulating courts of Washington Territory, and requiring judges of Supreme Court to assign places for holding, took effect when the order was made, pursuant to the act: Boyer v. Fowler, 1 W. T. 101.

Court is always deemed open for purposes connected with a cause submitted to the jury: Edwards v. Territory, 1 W. T. 195.

In a qualified sense, territorial courts are United States courts; they exercise the combined jurisdiction of Circuit and District Courts of the United States: Smith v. United States, 1 W. T. 262.

Territorial courts are not part of the federal judiciary: Nickels v. Griffin, 1 W. T. 374.

**Courts (continued).**

Judiciary act of 1789, and other acts conferring jurisdiction upon the United States courts, are not applicable to territorial courts: *Id.*

A District Court of the territory cannot properly be entitled a District Court of the United States: *Id.*

Courts are open at all times in the district for defaults, and judge in chambers in any part of the district can render such judgment in cases wherever pending in the district: *Murne v. Schwabacher Bros. & Co.*, 2 W. T. 130.

It is against public policy for persons to agree or undertake to occupy the attention of courts with pretended litigation in which there is no question to be judicially determined: *Connolly v. Cunningham*, 2 W. T. 242.

**Covenants.** See Contracts; Deeds.

**Coverture.** See Husband and Wife.

**Creditor's Suits.** See Executions and Proceedings Supplemental; Fraudulent Conveyances; Judgments.

**Criminal Conversation.**

Evidence of the marriage may be given by the testimony of eye-witnesses or the parties: *Jacobson v. Siddal*, 12 Or. 280.

The gist of the action is not alone the loss of service, but also loss of society and comfort of wife: *Id.*

Plaintiff may show the terms upon which he and his wife lived, and the effect of the injury upon their married life: *Id.*

**Criminal Law.** See Assault; Assault and Battery; Bonds; Codes; Fines and Forfeitures; Gaming; Game Laws; Homicide; Insanity; Jurisdiction; Jury and Jury Trial; Justice of the Peace; Kidnaping; Larceny; Liquor Laws; New Trial; Nuisance; Rape; Statutes.

1. IN GENERAL.

2. JURISDICTION.

3. INDICTMENT AND COMPLAINT.

4. EVIDENCE.

5. DEFENSES.

6. INSTRUCTIONS.

7. PRACTICE AND INCIDENTS OF TRIAL.

8. APPEALS.

**Criminal Law (continued).****1. IN GENERAL.**

Same act may be punishable under territorial law, and act of Congress: *Territory v. Coleman*, 1 Or. 191.

A pack of playing cards is a "gambling device," within the meaning of the statute: *Frisbie v. State*, 1 Or. 264.

An offense not declared by statute to be a felony, or punishable by imprisonment in the penitentiary, is a misdemeanor, punishable by imprisonment in the county jail: *Horner v. State*, 1 Or. 267.

Criminal statutes are to be strictly construed in favor of the accused: *Id.*

Must be construed in accordance with their natural and grammatical meaning: *Remington v. State*, 1 Or. 281.

Betting on a game of cards is not an offense under statute of 1858: *Id.*

Keeping open house, in which intoxicating liquor is kept for retail on Sunday, is indictable; former statute making it a misdemeanor is repealed by implication: *Palmer v. State*, 2 Or. 66.

Offense of larceny, committed without the state, continues and accompanies the stolen property carried into the state: *State v. Johnson*, 2 Or. 115.

The offense may be tried in any county of the state into which the stolen property may be brought by the offender: *Id.*

Embezzlement is the proper name for that crime where an agent fraudulently converts the money of his employer: *State v. Sweet*, 2 Or. 127.

The offense of having counterfeiting tools in possession with intent to use the same for counterfeiting is not included in the crime of counterfeiting, and may by act of legislature be made punishable by state courts: *State v. Brown*, 2 Or. 221.

Game of cards called "poker" is not a "gambling device" within the statute: *State v. Mann*, 2 Or. 238.

Said statute is void for uncertainty, since it does not enumerate the gambling devices prohibited: *Id.*

Defendant accused of stealing from the person may be convicted of larceny, or larceny from the person, if the facts charged in the indictment are sufficient to include both: *State v. Taylor*, 3 Or. 10.

**Criminal Law** (continued).

Assault with dangerous weapon is felony, and private person may arrest offender: *Lander v. Miles*, 3 Or. 35.

Under statute forbidding selling liquor without license, if the liquor be sold it is not material whether it be paid for: *State v. Cutting*, 3 Or. 260.

Not violation of such statute to give away liquor without expectation of pay: *Id.*

Subterfuge or understanding that the person obtaining the liquor will pay for it, or purchase something else because of it, is unavailing: *Id.*

Lottery is a game of hazard, in which small sums are ventured for the chance of obtaining greater: *Fleming v. Bills*, 3 Or. 286.

Payment of prizes in money is not essential to lottery: *Id.*

Same act may be punishable under city ordinance and state statute: *State v. Sly*, 4 Or. 277; *State v. Bergman*, 6 Or. 341; *Wong v. Astoria*, 13 Or. 538.

Any offense made punishable by section 527 of the Criminal Code (sec. 1735, Hill's A. L.) may be denominated mayhem: *State v. Vowels*, 4 Or. 324.

Not necessary to the validity of a statute against gambling, that it shall describe the manner in which the prohibited game is played: *State v. Carr*, 6 Or. 133; *State v. Gitt Lee*, 6 Or. 425.

It is sufficient if the game be described by name in the statute: *Id.*

Proceeding by indictment is an action at law, within the meaning of the statute of 1876 against gambling (c. 45, Hill's A. L.), to recover fines and forfeitures under that act: *State v. Carr*, 6 Or. 133.

There can be no legal compromise of a criminal charge where offender has not been arrested, nor in any way held to answer the charge: *Saxon v. Hill*, 6 Or. 388.

In comprising larceny under the statute, nothing more than the stolen property, or its value, and the necessary expense of reclaiming it, can be exacted: *Id.*

The satisfaction must be unequivocally acknowledged, not a simple agreement to acknowledge satisfaction: *Id.*

Homicide in perpetration of rape, arson, robbery, or bur-



**Criminal Law** (continued).

glary is murder in the first degree: *State v. Brown*, 7 Or. 186.

Removal of the goods being continuous and uninterrupted from time of the robbery until the time of killing while endeavoring to escape, the killing is done during the robbery: *Id.*

Acts of each person concerned in a joint criminal enterprise involve all: *State v. Johnson*, 7 Or. 210.

Where one intending to kill another misses him and kills a third person, he is equally guilty as though he had killed the person at whom he shot: *Id.*

Omission to make any question as to the degree is not admission of the degree charged: *State v. Whitney*, 7 Or. 386.

Money collected by a sheriff for taxes is the money of the county in his hands, and he may be guilty of larceny by converting the same to his own use: *State v. Dale*, 8 Or. 229.

Larceny of horse, saddle, and bridle, taken at same time and place, the property of the same person, is but one offense: *State v. McCormack*, 8 Or. 236.

Prosecution cannot split up such offense, and cause two indictments against the person so taking the articles: *Id.*

Person knowingly receiving an over-payment of money, paid him by mistake, and concealing such payment, converts the money to his own use, is guilty of larceny: *State v. Ducker*, 8 Or. 394.

A house kept for public dancing simply is not a "hurdy-gurdy" house within the statute: *State v. Tilley*, 9 Or. 125.

If the acts charged in the indictment constitute murder in the first degree, it will support conviction in either degree: *State v. Wintzingerode*, 9 Or. 153.

Power in a city charter to legislate to "secure the peace of the city" does not warrant the passage of an ordinance to close stores on Sunday: *Corvallis v. Carlile*, 10 Or. 139.

Acquittal of assault and battery is no bar to prosecution for kidnaping: *State v. Stewart*, 11 Or. 52; *S. C.*, 11 Or. 238.

**Criminal Law** (continued).

If a note has been "uttered or published as true or genuine" with intent to defraud, the offense under section 592, Criminal Code (sec. 1808, Hill's A. L.), is made out, though no defrauding was actually accomplished: *State v. Lurch*, 12 Or. 99.

City of Portland cannot declare violation of an ordinance a misdemeanor: *Portland v. Schmidt*, 13 Or. 17.

Penalty for violation of an act falls with its repeal, and cannot be applied to the violation of subsequent act without express language or necessary implication: *State v. Gaunt*, 13 Or. 115.

An act prohibited by law, for which no penalty has been provided, cannot be punished as a misdemeanor: *Id.*

No common-law offenses in Oregon; offense and penalty must be defined by statute: *Id.*

Right of trial by jury is common-law right, and a prosecution for violation of a city ordinance is not a criminal prosecution within the meaning of the constitution: *Wong v. Astoria*, 13 Or. 538.

No deprivation of right to trial by jury, that such trial cannot be had in an inferior court or until appeal is taken: *Id.*

City of Astoria has power to suppress and prohibit bawdy-houses, and punish for violation of the ordinance: *Id.*

Power in city by charter to prevent and restrain riot, noise, disturbance, etc., in the streets, does not authorize punishing for assault with dangerous weapon: *Walsh v. Union*, 13 Or. 589.

Statute giving cumulative damages to person losing money at gaming is remedial, and not criminal or penal in that respect, though other sections of the act are criminal: *O'Keefe v. Weber*, 14 Or. 55.

An action under such statute to recover damages is a civil, and not a criminal, action: *Id.*

Act of 1885 regarding license of bar-rooms, etc., is unconstitutional and void: *State v. Wright*, 14 Or. 365.

Pending prosecutions fall with the repeal of criminal statute; *Leschi v. Territory*, 1 W. T. 13.

Under indictment for a high-grade crime, verdict may be rendered for a lower grade necessarily contained in the offense charged: *Clarke v. Territory*, 1 W. T. 68.

**Criminal Law** (continued).

Homicide on an Indian reservation is within the federal jurisdiction, and the rules of the common law govern: *Shapoonmash v. United States*, 1 W. T. 188.

Within the admiralty jurisdiction of the United States, the crime is the same whether the murder of a citizen or a foreigner: *Smith v. United States*, 1 W. T. 262.

Statute conferring on city power to license saloons, etc., does not repeal a general statute forbidding sale of liquor without license from the board of county commissioners: *Corbett v. Territory*, 1 W. T. 431.

Statute prescribing qualifications of a person practicing medicine is not an *ex post facto* law or in violation of fourteenth amendment: *Fox v. Territory*, 2 W. T. 297.

Sentence cannot be increased after judgment and commitment: *State v. Cannon*, 11 Or. 313.

**2. JURISDICTION.**

Territorial courts may punish offense against the United States of selling liquor to Indians, since the territory is a part of the Indian country: *United States v. Tom*, 1 Or. 26; *Fowler v. United States*, 1 W. T. 3.

One who sells liquor to Indians may be punished under the territorial law and the law of the United States: *Territory v. Coleman*, 1 Or. 191.

Offense of larceny committed without the state continues and accompanies the stolen property, and may be punished in any county in the state where the property is brought by the offender: *State v. Johnson*, 2 Or. 115.

Justice of the peace has no authority to hear and determine felony cases, but only to act as examining magistrate: *Williams v. Shelby*, 2 Or. 144.

Authority for punishing counterfeiting rests exclusively with the United States courts: *State v. Brown*, 2 Or. 221.

State courts, under statute, may have authority to punish for having counterfeiting tools in possession with intent to use the same: *Id.*

Jurisdiction of Police Court may be made the same as that of justice of the peace, but cannot be limited to criminal cases: *State v. Wiley*, 4 Or. 184.

While acting as justice of the peace, police judge has

**Criminal Law** (continued).

same jurisdiction as a justice: *Id.*; *Portland v. Denny*, 5 Or. 160.

Circuit Court has jurisdiction of crime of assault and battery: *State v. Sly*, 4 Or. 277.

By charter of city of Portland, police judge has jurisdiction of all crimes defined by ordinance of said city: *Portland v. Denny*, 5 Or. 160.

In addition to such jurisdiction, he has jurisdiction identical with justices of the peace: *Id.*

A city ordinance which provides for punishing an act already a crime under the state law does not deprive Circuit Court of jurisdiction under the state law: *State v. Bergman*, 6 Or. 341.

Under city charter giving power to prevent and restrain riot, noise, disturbance, etc., in the streets, city cannot give recorder's court jurisdiction to punish assault with dangerous weapon: *Walsh v. Union*, 13 Or. 589.

Act of Congress, August 16, 1856, limiting times and places of holding District Courts, not an act affecting jurisdiction: *Leschi v. Territory*, 1 W. T. 13.

The act simply designates the times and places for the exercise of jurisdiction, and the authority over crimes remains the same: *Id.*

Homicide on Indian reservation is within the jurisdiction of the courts of the United States: *Shapoonmash v. United States*, 1 W. T. 188.

Acts of Congress of 1825, 1835, 1846, and 1856 are not restrictive of the act of 1790, but rather enlarge the jurisdiction of the United States courts: *Smith v. United States*, 1 W. T. 262.

Marine torts committed on tide-waters within the boundaries of a county are within the jurisdiction of the United States courts: *Id.*

It seems the territorial courts would also have jurisdiction of such offenses: *Id.*

Murder committed on San Juan Island, at the time when that island was jointly occupied, under convention, by the United States and Great Britain, pending settlement of boundary, is within the jurisdiction of the territorial courts: *Watts v. United States*, 1 W. T. 289; *Watts v. Territory*, 1 W. T. 409.



**Criminal Law (continued).****3. INDICTMENT AND COMPLAINT.**

Allegation of mortal wounding on a day certain, the particular day of the death not being alleged in the indictment, is sufficient, if the indictment is found and presented within a year from time of giving the wound: *Bowen v. State*, 1 Or. 270.

Requisites of indictment in liquor license case, and what is surplusage therein: *Burchard v. State*, 2 Or. 78.

Embezzlement is proper term in indictment for fraudulent conversion by agent of employer's money: *State v. Sweet*, 2 Or. 127.

If indictment state sufficient facts to constitute larceny from the person, it includes simple larceny: *State v. Taylor*, 3 Or. 10.

Form set forth in appendix to Code is sufficient for an indictment, and appendix is a part of the Code: *State v. Dodson*, 4 Or. 64; *State v. Spencer*, 6 Or. 152; *State v. Brown*, 7 Or. 186; *State v. Lee Yan Yan*, 10 Or. 365.

Essentials of indictment under section 636 of Code, for unlawful charging of fees by public officer: *State v. Packard*, 4 Or. 157; *State v. Perham*, 4 Or. 188.

Indictment must set forth the acts and circumstances constituting the offense: *State v. Packard*, 4 Or. 157; *State v. Perham*, 4 Or. 188; *State v. Dougherty*, 4 Or. 200.

Essentials of an indictment for setting up a lottery: *State v. Dougherty*, 4 Or. 200.

Complaint before magistrate need not be in writing on a charge of felony: *Hannah v. Wells*, 4 Or. 249.

Any offense under section 527 of the Criminal Code (sec. 1735, Hill's A. L.) may be called mayhem in indictments: *State v. Vowels*, 4 Or. 324.

Indictment for illegal voting under section 630 of Criminal Code (sec. 1846, Hill's A. L.): *State v. Bruce*, 5 Or. 68.

Where the acts and circumstances are omitted, defect must be taken advantage of by demurrer, or is waived: *State v. Bruce*, 5 Or. 68; *State v. Doty*, 5 Or. 491.

Indictment for assault with intent to kill is sufficient, if not demurred to, if in language of statute, although it does not state the acts constituting the offense: *State v. Doty*, 5 Or. 491.

**Criminal Law** (continued).

What objections are waived by failure to demur: *Id.*

Where statute states the offense disjunctively, indictment is sufficient if it embrace the whole in a single count, using "and" for "or": *State v. Carr*, 6 Or. 133; *State v. Bergman*, 6 Or. 341; *State v. Dale*, 8 Or. 229.

Dealing, playing, and carrying on faro constitute one offense, and may be so charged: *Id.*

The language of the statute is explicit enough for the indictment, without further description: *Id.*; *State v. Sam*, 14 Or. 347.

Requisites and sufficiency of indictment for perjury: *State v. Spencer*, 6 Or. 152; *State v. Witham*, 6 Or. 366.

Essentials of indictment for public nuisance: *State v. Bergman*, 6 Or. 341; *State v. Hume*, 12 Or. 133.

Indictment for gambling need not name the game or device, but must describe the device, and allege that it was adapted and used for playing games for money, etc.: *State v. Gitt Lee*, 6 Or. 425.

Indictment for homicide in committing robbery need not allege that the killing was purposely done: *State v. Brown*, 7 Or. 186.

Separate indictments cannot be made for taking of three articles belonging to the same person, at the same time and place: *State v. McCormack*, 8 Or. 236.

Indictment for murder may state the facts generally, as provided by the Code: *State v. Wintzingerode*, 9 Or. 153.

Use of singular instead of plural verb, where charge is evidently meant against all defendants, does not vitiate: *State v. Lee Ping Bow*, 10 Or. 27.

In an indictment for "stealing from and on the person," the phrase "and on" is surplusage merely: *Id.*

Indictment for larceny need not use the word "steal"; "feloniously took and carried away" is sufficient: *State v. Lee Yan Yan*, 10 Or. 365.

One present aiding and abetting may be convicted under indictment charging him directly with the act: *State v. Kirk*, 10 Or. 505.

Indictment charging defendant with having purposely, etc., killed the deceased "by then and there unlawfully and feloniously shooting him," the words "unlawfully

**Criminal Law** (continued).

and feloniously" are surplusage, and the indictment charges murder in the first degree: *State v. Abrams*, 11 Or. 169.

Indictment must be so drawn as to exclude any assumption that it may be proved and the defendant still be not guilty: *State v. Smith*, 11 Or. 205.

Indictment for assault upon an officer of the penitentiary must allege knowledge that he was such officer: *Id.*

Indictment for rioting, charging robbery also; the details related regarding the robbery are surplusage: *State v. Tom Loney and Loo Wan*, 11 Or. 326.

It is sufficient for such indictment to allege that the defendants "did encourage other persons participating" in said riot to acts of violence and force: *Id.*

The intent to defraud, in uttering forged paper, is the gist of the crime, and actual defrauding need not be proved: *State v. Lurch*, 12 Or. 99.

In an indictment for forgery, the person defrauded need not be named; if named, must be proved as alleged: *State v. Lurch*, 12 Or. 104.

Indictment for obstructing highway, when and how the *termini* and *locus* must be alleged: *State v. Hume*, 12 Or. 133.

Indictment found by a grand jury not legally called (under act of 1885) is invalid, and judgment of conviction thereon must be reversed: *State v. Lawrence*, 12 Or. 297.

In complaint for keeping bawdy-house, the phrase "willfully and unlawfully" is equivalent to and implies "knowingly": *Wong v. Astoria*, 13 Or. 538.

In complaint for violation of city ordinance (prior to 1885), the ordinance, or so much thereof as is relied upon, must be set forth or recited: *Nodine v. Union*, 13 Or. 587.

Where the offense from its nature continues from day to day, it is sufficient to charge it as of any one day: *State v. Sam*, 14 Or. 347.

Indictment charging murder, as at common law, is sufficient to sustain verdict of murder in first degree under statute: *Leschi v. Territory*, 1 W. T. 13.

The peculiar circumstances distinguishing murder in the

**Criminal Law** (continued).

first degree under statute need not be set out in the indictment: *Id.*

Indictment charging statutory offense unknown to the common law should charge the circumstances and intent mentioned in the statute, but the words of the statute need not be used if equivalent words are used: *Id.*

If some counts in indictment are good and some bad, verdict is presumed to be based on the good counts: *Id.*

Where record shows that grand jury appeared in open court, and their foreman in their presence presented a true bill properly indorsed, it sufficiently appears that it was found by concurrence of at least twelve jurors: *Watts v. Territory*, 1 W. T. 409.

Omission of word "feloniously" in charging homicide is not error, if the indictment follows the language of the statute: *Id.*

Not necessary, in case of murder, that the records in the trial court show copy of indictment was served upon the prisoner: *Lytle v. Territory*, 1 W. T. 435; *Leonard v. Territory*, 2 W. T. 381.

Indictment charging stealing, at same time and place, of a horse, the property of one M., and another horse the property of —, charges but one offense, a single transaction: *Territory v. Heywood*, 2 W. T. 180.

Objection to such indictment for charging double offense is waived by failure to demur: *Id.*

Venue is sufficiently set out as being in King County by charging the offense was committed in Seattle, the court taking judicial knowledge of the fact that Seattle is in King County: *Schilling v. Territory*, 2 W. T. 283.

Indictment for murder in the first degree must not only allege the assault and shooting to have been done purposely, and of deliberate and premeditated malice, but must charge the same of the killing itself: *Leonard v. Territory*, 2 W. T. 381.

Words in the conclusion of the indictment do not supply such essential averment, and are but an inference of the grand jury from their former statement, which the language will not admit: *Id.*

Statute regarding liberal construction of criminal pleadings does not, while doing away with the technicalities



**Criminal Law** (continued).

of the common law, ignore the necessity of expressing the charge in adequate language: *Id.*

Form of indictment for murder in the first degree given: *Id.*

**4. EVIDENCE.**

For opinion evidence, *res gestæ*, character, admissions and declarations, confessions, and dying declarations, see Evidence.

State need do no more than prove the substantive offense charged: *Frisbie v. State*, 1 Or. 248.

Allegation of sale of whisky, being under a *videlicet*, will be supported by proof of sale of any kind of spirituous liquor: *Id.*

Kind of liquor being stated under *videlicet*, will excuse strict proof, unless essentially descriptive: *Id.*

Allegations of names, sums, dates, and the like, must be strictly proven: *Shirley v. State*, 1 Or. 269.

Receipt for sixty-five dollars, to prove allegation of forging receipt for sixty dollars, is fatal variance: *Id.*

Conspiracy to murder, evidence and instructions: *State v. Fitzhugh*, 2 Or. 227.

Inconsistent statements of witness made at other times are not evidence of the facts stated in such declarations, but simply tend to impeach his character for truth: *Id.*

Refusal of court to allow a question tending to show hostility of witness; held, not to prejudice the defendant's rights under the circumstances of the case: *Id.*

Not error for court to allow witness to inspect a written deposition made by her in a former examination before answering as to its contents: *State v. Taylor*, 3 Or. 10.

Where conversations are admissible in evidence, the whole conversation may be admitted: *Id.*

Reasonable doubt defined: *State v. Conally*, 3 Or. 69; *State v. Glass*, 5 Or. 73; *State v. Ah Lee*, 7 Or. 237; *State v. Anderson*, 10 Or. 448; *State v. Abrams*, 11 Or. 169; *Smith v. United States*, 1 W. T. 262; *Leonard v. Territory*, 2 W. T. 381.

Burden of proof in homicide case, after the shooting purposely is shown, is on defendant to show justification or excuse: *State v. Conally*, 3 Or. 69.

Rule in regard to reasonable doubt does not apply to jus-

**Criminal Law** (continued).

tification or excuse, but defendant must show such defense by preponderance of evidence: *Id.*

The question whether the killing was necessary to prevent felony is to be determined by preponderance of evidence: *Id.*

Time, and kind of liquor sold need not be strictly proved; but where the name of the person to whom it was sold is stated in the indictment, it must be strictly proved: *State v. Cutting*, 3 Or. 260.

Evidence of sale of liquor in violation of liquor license law: *Id.*

The burden of proof is on the defendant to show that he is licensed: *Id.*

Proof of shooting with revolver will sustain allegation of shooting with a pistol: *State v. Dodson*, 4 Or. 64.

Threats and conduct of deceased, in homicide case, toward the prisoner some days before the killing, may be shown under defense of justification in proof of self-defense: *Id.*

Prosecution need not prove the case to an absolute moral certainty, to the exclusion of any other hypothesis being true: *State v. Glass*, 5 Or. 73.

When the charge is manslaughter, committed by attempting to procure abortion, evidence of prior attempt of deceased to effect such purpose is immaterial, unless such attempt contributed to her death: *Id.*

Evidence of attempts of prisoner to escape is admissible, and tends to prove his guilt: *State v. Garrand*, 5 Or. 216.

On trial for assault with intent to kill, defendant cannot show in justification that prior to the affray he made complaint before a magistrate, and sought to have the assaulted party bound over to keep the peace: *State v. Doty*, 5 Or. 491.

Evidence of dealing, playing, and carrying on faro, at one time, with the same parties, sustains indictment as one offense: *State v. Carr*, 6 Or. 133.

Allegation of larceny of the property of A is not sustained by proof that the property belonged to A and B, as partners, unless a special ownership and possession in A is proved: *State v. Wilson*, 6 Or. 428.

Laws of a foreign country must be proved as facts: *State v. Moy Looke*, 7 Or. 54.

**Criminal Law** (continued).

Unwritten law of a country cannot be proved by historical works, but by oral testimony, or published decisions: *Id.*

Validity of a marriage under Chinese law, proved by documentary evidence, is a question for the court: *Id.*

Proof of statement sworn to by person charged with perjury, differing in the date from the statement alleged in the indictment, is a material variance: *State v. Ah Sam*, 7 Or. 477.

Testimony of accomplice will not alone warrant conviction: *State v. Odell*, 8 Or. 30.

Proof that the prisoner was in the same town at the time is not sufficient corroboration: *Id.*

Evidence in a homicide case of the fact that two guns were found after the shooting, secreted under the bed of the defendant, is admissible: *State v. Wintzingerode*, 9 Or. 153.

Money of a kind known to have been possessed by the deceased may be shown to have been in the defendant's possession the day after the killing: *Id.*

Evidence, if relevant to the issue, is not rendered inadmissible for the reason that it tends to prove the accused guilty of collateral offenses: *Id.*

Evidence that the person robbed had money shortly before the alleged theft is admissible, when accompanied by evidence of the stealing from the person: *State v. Lee Ping Bow*, 10 Or. 27.

Defendant offering himself as a witness in his own behalf subjects himself to the same rules of cross-examination as an ordinary witness, but may not be examined as to matters not testified to on direct examination: *State v. Abrams*, 11 Or. 169; *State v. Lurch*, 12 Or. 99; *State v. Saunders*, 14 Or. 300; *Thompson v. Territory*, 1 W. T. 547.

The substance of contradictory statements only, imputed to a witness in the impeaching questions, need be proved to impeach him: *Id.*

The conduct of a party, and what he did at the time, is competent evidence in the issue whether he was intoxicated: *Id.*

The presumption is, that evidence was admitted for proper

**Criminal Law** (continued).

- purpose, where it was equally applicable to either of two purposes, one proper and the other not: *Id.*
- Experiments to furnish *data* for certain inferences must have been based on conditions similar to those existing in the case on trial: *State v. Justus*, 11 Or. 178.
- Experiments, made by non-professional witnesses, with a gun upon paste-boards, to show powder-burns, and to raise inference that deceased came to his death from near gunshot wound, inadmissible: *Id.*
- The admission of expert testimony upon the issue of whether the gun was fired near to deceased or from a distance, when the killing is not susceptible of direct proof: *Id.*
- Upon trial for obtaining money by false pretenses, by giving certain forged instruments, defendant may show that the signatures on the face of the notes were made by him in his own handwriting, by authority of the persons whose names were signed: *State v. Lurch*, 12 Or. 95.
- In forgery case, proof that the signature to the note is in a simulated hand is admissible, though the defendant admits signing it, claiming to have had authority: *State v. Lurch*, 12 Or. 99; *S. C.*, 12 Or. 104.
- State cannot, after defendant testifies he did not sign, have him, on cross-examination, write his name for comparison: *Id.*
- In forgery, it is not necessary to name in the indictment the person defrauded, but having done so, the allegation must be proved as alleged: *State v. Lurch*, 12 Or. 104.
- Attention of witness may be called to inconsistent statements made at other times, and if he denies them, witnesses may be called to prove his having made them: *State v. Lurch*, 12 Or. 104; *Thompson v. Territory*, 1 W. T. 547.
- Declarations of hostility and contradictory statements are admitted to impeach a witness upon the same footing: *State v. Mackey*, 12 Or. 154.
- The only presumption arising from the possession of property recently stolen is one of fact, not of law: *State v. Hale*, 12 Or. 352.



**Criminal Law (continued).**

It may be shown on cross-examination of a witness that he has been convicted of crime, including felony and misdemeanor, and the record may be introduced to prove that fact: *State v. Bacon*, 13 Or. 143.

Witness may be asked whether he has been arrested for commission of a certain crime, for purpose of discrediting the witness: *Id.*

Proof that the accused had obtained a gun at a distant point, and was seen at different places before the murder, carrying it toward the place where the crime was committed, is not rebutted by proof that he was seen without it at one place on the way, and such evidence is not admissible: *State v. O'Neil*, 13 Or. 183.

In criminal cases, especially where life is involved, a liberal rule should be adopted in the receipt of evidence for the defense: *Id.*; *State v. Mah Jim*, 13 Or. 235.

Any question which tends to show bias or prejudice of witness against the accused is competent: *Id.*

Counsel should be allowed to pursue their own course in eliciting testimony so long as they keep within bounds: *Id.*

To constitute the offense of frequenting an opium den would require more than one visit; how many is a question of mixed law and fact: *State v. Sam*, 14 Or. 347.

Testimony of an accessory before the fact is not admissible in behalf of the prisoner: *Edwards v. Territory*, 1 W. T. 195.

Evidence of the dangerous character of the deceased is not admissible in homicide case where there is no evidence tending to show an assault or threatened assault on his part: *Smith v. United States*, 1 W. T. 262.

The distinction between an exhibit and the testimony of a witness, whether oral or in writing, pointed out: *Doctor Jack v. Territory*, 2 W. T. 101.

Court properly refused to admit on behalf of the defense a map to illustrate the situation, the same being loaded with explanatory matter in the nature of hearsay: *Leonard v. Territory*, 2 W. T. 381.

**5. DEFENSES.**

That Congress has already passed a law for punishment

**Criminal Law** (continued).

of persons selling liquor to Indians is no bar to conviction under territorial statute for such offense: *Territory v. Coleman*, 1 Or. 191.

The law of self-defense examined and discussed: *Goodall v. State*, 1 Or. 333; *State v. Conally*, 3 Or. 69; *State v. Dodson*, 4 Or. 64.

Evidence of threats of threats of deceased as proving the killing, justifiable in homicide: *State v. Dodson*, 4 Or. 64.

Conviction of disturbing the peace before city recorder no bar to a subsequent prosecution in the Circuit Court for assault and battery: *State v. Sly*, 4 Or. 277.

Evidence that the accused, prior to the affray, made complaint before a magistrate, charging the assaulted party with having previously threatened his life, and asking to have him put under bonds to keep the peace, is not admissible in assault with intent to kill: *State v. Doty*, 5 Or. 491.

Objection to the right of the trial judge to hold the office of judge cannot be made collaterally in a criminal case: *State v. Whitney*, 7 Or. 386.

That an attorney employed to assist the prosecution was present before the grand jury when the indictment was found is no ground for reversal after judgment: *Id.*; *State v. Justus*, 11 Or. 178.

Former conviction on an indictment for taking saddle and bridle is a defense to subsequent prosecution for larceny of horse at same time and place belonging to the same person: *State v. McCormack*, 8 Or. 236.

Former conviction of assault and battery no defense to charge of kidnaping: *State v. Stewart*, 11 Or. 52; *S. C.*, 11 Or. 238.

Insanity as a defense to crime: *State v. Murray*, 11 Or. 413; *McAllister v. Territory*, 1 W. T. 360.

Defendant accused of obtaining money by false pretenses by forged signatures to notes may prove that the signatures were written by him with authority: *State v. Lurch*, 12 Or. 95.

## 6. INSTRUCTIONS.

The court is justified in instructing that there is no evidence on a certain point: *Latshaw v. Territory*, 1 Or. 140; *State v. Garrand*, 5 Or. 216.

**Criminal Law** (continued).

No error to refuse to instruct on points on which there is no evidence: *Latshaw v. Territory*, 1 Or. 140; *State v. Glass*, 5 Or. 73; *Doctor Jack v. Territory*, 2 W. T. 101.

It is error to instruct that if the liquor was given gratuitously, it would sustain the indictment for selling without license equally as if it had been sold and paid for: *Wood v. Territory*, 1 Or. 223.

Error to refuse to instruct that if the liquor was gratuitously given, without consideration, the defendant could not be convicted: *Id.*

Instructions as to law of self-defense: *Goodall v. State*, 1 Or. 333; *State v. Conally*, 3 Or. 69.

Instructions as to degree of certainty necessary to be proved, and reasonable doubt: *State v. Conally*, 3 Or. 69; *State v. Glass*, 5 Or. 73; *State v. Ah Lee*, 7 Or. 237; *State v. Anderson*, 10 Or. 448; *State v. Abrams*, 11 Or. 169; *Smith v. United States*, 1 W. T. 262; *Leonard v. Territory*, 2 W. T. 381.

Where in homicide case there is no evidence to reduce the crime from murder in the first degree, the court may so instruct: *State v. Garrand*, 5 Or. 216; *State v. Whitney*, 7 Or. 386; *Smith v. United States*, 1 W. T. 262.

But where the defendant does not admit the degree charged, and there is any conflict of testimony as to premeditation, it is erroneous to so charge: *State v. Ah Lee*, 7 Or. 237; *State v. Whitney*, 7 Or. 386; *State v. Grant*, 7 Or. 414.

Instruction assuming that an admission on the trial that the deceased was killed by gunshot, at the time and place charged, was an admission that he was murdered, is erroneous: *State v. Whitney*, 7 Or. 386.

Not error for the court to give the jury a general description of the offense, although embracing modes of commission not pertinent to the case, provided the definition be subsequently given as applicable to the pleadings and testimony: *State v. Anderson*, 10 Or. 448.

Where the court gives a correct definition of reasonable doubt, it is no error to refuse to give an equally correct one: *Id.*

There is no difference between an occurrence "directly tending" to prove a prior fact, and one which "tends"

**Criminal Law** (continued).

to prove it, and an instruction based on a supposed distinction between them is immaterial: *Id.*

The entire charge of the court must be considered to ascertain the meaning and effect of any particular portion excepted to: *Id.*

It is error to instruct the jury not to regard "mere slight variances" between the testimony of witnesses as affecting their credit: *State v. Swayze*, 11 Or. 357.

Plea of not guilty puts in issue the fact of the killing as well as the premeditation and malice, and an instruction assuming the killing proved is erroneous: *State v. Mackey*, 12 Or. 154.

The phrase used in instruction, "You may consider this as a circumstance in determining the guilt or innocence of the defendant," does not imply that innocence is a fact to be established: *State v. O'Neil*, 13 Or. 183.

Instruction as to intent to be judged by the jury, on trial under indictment for selling or offering for sale oleomargarine unmarked, held not erroneous: *State v. Dunbar*, 13 Or. 591.

Statement of the effect at common law of a disagreement of jury, and the mitigation of the rule in United States, with the remark that jury would have to stay together and not separate until verdict found, is not objectionable as assuming the case was so plain that jury would not be justified in failing to agree: *State v. Saunders*, 14 Or. 300.

The Supreme Court will not review erroneous instructions on mere abstract principles, of law: *Yelm Jim v. Territory*, 1 W. T. 63.

Bill of exceptions must show whether instructions given or refused were pertinent to the case, in order for Supreme Court to examine them: *Id.*

Where a fact has been proved beyond all controversy, it is not error, in giving instructions, to mention it as a fact in the case: *Edwards v. Territory*, 1 W. T. 195.

Where the court withheld instructions on manslaughter, telling the jury that if, having deliberated, they desired instructions on that subject, he would give them, no error was committed: *Smith v. United States*, 1 W. T. 262.



**Criminal Law (continued).**

Not error to refuse to instruct that where one of two combatants kills a third person, who interferes without reasonable notice to prevent one of the contestants from killing the other, such killing cannot be murder in the first degree: *McAllister v. Territory*, 1 W. T. 360.

The court properly refused to instruct the jury that if, while two persons are engaged in fighting, a third person assaults one of the combatants, and is killed by him, such killing is no more than manslaughter: *Id.*

Court may, after the return of the jury into court with their verdict, but before the reception of the same, correct any erroneous instruction that may have been given, and send them back again to deliberate: *Doctor Jack v. Territory*, 2 W. T. 101.

There being no evidence in the case to show that the fatal blow was accidental or given in self-defense, it was not necessary for the court to qualify its instructions to meet such evidence: *Id.*

Instructions that jury might assume, if the name of the owner of property stolen is unknown to them at time of trial, that it was unknown to the grand jury at time indictment was found, is not erroneous: *Territory v. Heywood*, 2 W. T. 180.

Instruction that the fact that prisoner does not disprove circumstances, if the jury believe he has the means of disproving them if false, lends additional weight to such as are proved, is erroneous: *Leonard v. Territory*, 2 W. T. 381.

Instruction not leaving jury to find whether the killing was justifiable or excusable is erroneous: *Id.*

So an instruction that does not make malice essential to either degree, or inform the jury that in order to constitute murder in either degree, the malice, and not merely the killing, must be deliberate and premeditated, does not correspond with the law: *Id.*

**7. PRACTICE AND INCIDENTS OF TRIAL.**

Court may amend the record during the term to conform with the facts: *Howell v. State*, 1 Or. 241.

Continuance not granted where it is not satisfactorily shown that the evidence can probably be had at the next term: *State v. Leonard*, 3 Or. 157.

**Criminal Law (continued).**

Error to receive verdict in the absence of the prisoner in a felony case: *State v. Spores*, 4 Or. 198.

The trial includes the rendition and receiving of the verdict: *Id.*

Court has power to communicate with jury through the bailiff while deliberating, and such action will not be ground for reversal where no injury was occasioned: *State v. Garrand*, 5 Or. 216.

Motion to quash indictment on account of a stranger having been present during the proceedings before the grand jury, is properly overruled, and such objections are waived by going to trial without objecting: *State v. Whitney*, 7 Or. 386; *State v. Justus*, 11 Or. 178.

Omission to provide for presence of defendant or his counsel, on view by the jury, is not error where not requested: *State v. Ah Lee*, 8 Or. 214.

Verdict may be received, notwithstanding counsel for defendant is absent: *State v. Lee Ping Bow*, 10 Or. 27.

Improper remarks of district attorney must be objected to, and exception saved at the time: *Id.*

Record showing that defendant was "given an opportunity to make a statement" before sentence, sufficiently shows that he was asked "if he had anything to say why sentence should not be passed": *State v. Cartwright*, 10 Or. 193.

Witness examined by the grand jury, whose name is not put on the indictment, may, nevertheless, be examined by the prosecution where the defendant was not thereby misled: *State v. Anderson*, 10 Or. 448.

Mere objection and exception to improper remarks of the district attorney will not avail: *Id.*; *State v. Abrams*, 11 Or. 169.

Record held sufficient as to arraignment: *State v. Abrams*, 11 Or. 169.

Time of trial may be set by the court when the defendant is not present: *Id.*

Keeping shackles on prisoner during trial, without evident necessity, when objected to, is error: *State v. Smith*, 11 Or. 205.

Granting or refusing continuance is discretionary: *State v. O'Neil*, 13 Or. 183; *Thompson v. Territory*, 1 W. T. 547.

**Criminal Law** (continued).

In affidavit for continuance, it is not sufficient to allege belief that witness can be had; but the affidavit must show the grounds for the belief: *Id.*

Trial of prisoner without entering his plea is ground for reversal: *Palmer v. United States*, 1 W. T. 5.

Record showing that the jury was "duly sworn," sufficiently shows that the proper oath was administered: *Leschi v. Territory*, 1 W. T. 13.

Courts have power to restrain counsel and keep them within proper limits: *Id.*

It sufficiently appears by the record in this case that the defendant was present when verdict was rendered and sentence passed: *State v. Cartwright*, 10 Or. 193; *Leschi v. Territory*, 1 W. T. 13.

Where the record shows the impaneling of grand jury void, an indictment returned by it is a nullity, and the court should stay the proceedings as soon as its attention is directed thereto: *Yelm Jim v. Territory*, 1 W. T. 63.

If objection to a juror be not taken at the time of impaneling the jury, it is waived: *Clarke v. Territory*, 1 W. T. 68.

Arraignment defined; it cannot be waived in murder case: *Elick v. Territory*, 1 W. T. 136.

Consent of counsel to enter plea of not guilty will not dispense with arraignment: *Id.*

Prisoner must personally enter his plea, unless shown to be incapacitated: *Id.*

In the trial of one unacquainted with the English language, a sworn interpreter should be provided: *Id.*

In such case the charge must be explained, and the plea entered through the interpreter, who must also make known the evidence to the accused, as the trial proceeds: *Id.*

Record not showing prisoner in court when verdict was returned, or showing that disposition was made of the jury in adjourning from day to day, is insufficient: *Shapoonmash v. United States*, 1 W. T. 188.

Not error to submit to jury written charge of the court, or permit them to take statutes to the jury-room: *Edwards v. Territory*, 1 W. T. 195.

**Criminal Law** (continued).

The court is always deemed open for the purposes connected with a cause submitted to a jury, and may receive verdict after adjournment at night and before the meeting of court the next morning: *Id.*

Not error to place jury in charge of a sworn officer of the court, who has been called upon to testify for the territory on the trial: *Id.*

Allowing one or more jurors to retire from the jury-room for a necessary purpose, under the direct supervision of the officer, is not regarded as a separation of the jury: *Id.*

It is competent for the prosecuting officer of the United States to enter a *nolle* any time before verdict: *Smith v. United States*, 1 W. T. 262.

Errors committed under an indictment discharged cannot be taken advantage of under a subsequent indictment, unless proper objection be made under the latter indictment: *Id.*

It is not necessary in murder case that the records show that copy of indictment was served on the defendant: *Lytle v. Territory*, 1 W. T. 435.

Addition of the words "and the law as given by the court" to the statutory oath to jury, is not error: *Hartigan v. Territory*, 1 W. T. 447; and see *Leonard v. Territory*, 2 W. T. 381.

Separation of jury in capital case, with consent of defendant and prosecuting attorney, is of doubtful propriety, but no ground for reversal unless shown to have been an injury: *Id.*

Where the defendant and his counsel have consented to separation of jury, they should be estopped to object thereto: *Id.*

The object of the statute that the accused "shall be tried at the next term of court after he was imprisoned" was to secure speedy trials, and not to promote delay: *Thompson v. Territory*, 1 W. T. 547.

One charged with crime is entitled to continuance only in case he make the showing therefor required in other cases: *Id.*

Court may, before verdict is received, though after jury returns into court therewith, correct the instructions



**Criminal Law** (continued).

given, and send the jury back for further deliberation:  
*Doctor Jack v. Territory*, 2 W. T. 101.

Not error to permit jury to take to jury-room hat and garment offered in evidence: *Id.*

The intention of the statute allowing the jury to take to the jury-room all papers admitted in evidence is to allow them to take all exhibits admitted in evidence: *Id.*

## 8. APPEAL AND ERROR IN CRIMINAL CASES.

The plea *in nullo est erratum*, in proceedings on error, operates as a demurrer, not as a confession: *O'Kelly v. Territory*, 1 Or. 51.

Court may affirm or reverse judgment, but not modify it:  
*Howell v. State*, 1 Or. 241.

As a general rule affirmance is final, but court will hold discretionary control of the case for purposes of a rehearing: *McDonald v. Crusen*, 2 Or. 259.

Statement of errors relied on is not necessary in the notice of appeal; rule adopted requiring the same to be furnished on demand: *State v. Ellis*, 3 Or. 497.

Bill of exceptions must show that the question was raised and passed upon by the Circuit Court: *State v. Dodson*, 4 Or. 64.

Order to be appealable must affect a substantial right and determine the action: *State v. Brown*, 5 Or. 119.

How notice must be served when the state appeals: *Id.*

An appeal does not vacate the judgment appealed from:  
*Whitley v. Murphy*, 5 Or. 328.

When appeal abates by death of the accused the judgment remains in full force: *Id.*

When defendant appeals from Justice's Court, the appeal is taken as in civil cases, except that notice is to be served on the district attorney or private prosecutor:  
*State v. Zingsem*, 7 Or. 137.

On appeal to Circuit Court, if appellant fails to file original notice with proof of service, in the Justice's Court, and no appeal is allowed or transcript filed, no appeal is taken, and Circuit Court can enter no judgment against defendant or his sureties: *Id.*

The provisions of section 531 of Civil Code (sec. 541, Hill's A. L.) do not affect appeals in criminal cases: *State v. Bovee*, 11 Or. 57.

**Criminal Law** (continued).

Appeal in criminal cases, taken during a term of the Supreme Court may, in its discretion, be heard at same term: *Id.*

Order enlarging the time within which clerk must prepare and transmit transcript must be made by the trial court: *Id.*

In suing out writs of error, where service on the United States is necessary, the United States attorney must be served; service on his assistant will not avail: *Bennet v. United States*, 2 W. T. 179.

Where United States is a party, the rule of practice of the common law, modified to be applicable, should govern, the legislature not having provided a rule of practice: *Id.*

The Supreme Court will take no notice of an *ex parte* affidavit filed with the papers of the case, but not embodied in the bill of exceptions: *Fox v. Territory*, 2 W. T. 297.

Overruling motion for new trial cannot be alleged as error: *Brown v. State*, 1 Or. 270; *State v. Fitzhugh*, 2 Or. 227; *State v. Wilson*, 6 Or. 428; *State v. Mackey*, 12 Or. 154; *State v. Becker*, 12 Or. 318; *Wassissimi v. Territory*, 1 W. T. 6; *Smith v. United States*, 1 W. T. 262.

Court is bound by the record, and will not search for error outside thereof: *O'Kelly v. Territory*, 1 Or. 51; *State v. Wilson*, 6 Or. 428.

Court will presume evidence supported instruction given, where bill of exception does not purport to give all the evidence: *State v. Lee Yan Yan*, 10 Or. 365.

Motion based on facts therein stated, but not otherwise appearing in the record, cannot be considered on appeal: \* *State v. Anderson*, 10 Or. 448.

No objection to the proceedings in the Circuit Court in any case can be considered in the Supreme Court, which has not in effect been passed upon by the lower court: *State v. Abrams*, 11 Or. 169.

Where evidence was admitted without objection, it is presumed to have been admitted for a proper purpose rather than an improper, when applicable to either: *Id.*

Where the error did not prejudice appellant, reversal will not be granted generally; but where the error violates

**Criminal Law** (continued).

a constitutional guaranty of personal liberty, the law will presume an injury: *State v. Lurch*, 12 Or. 99.

Action of trial court in accepting a juror challenged will not ordinarily be reviewed on appeal: *State v. Saunders*, 14 Or. 300.

Motion in arrest of judgment, made and afterwards waived in the lower court, cannot be considered on appeal: *Freany v. Territory*, 1 W. T. 71.

Alleged error must be presented by bill of exceptions, or cannot be considered on appeal: *Hartigan v. Territory*, 1 W. T. 447.

Bill of exceptions must show whether instructions were pertinent before error in giving or refusing them will be considered: *Yelm Jim v. Territory*, 1 W. T. 63.

Instructions must have been excepted to at the time when given, to be considered on appeal: *Smith v. United States*, 1 W. T. 262.

It is not necessary that the journal entries in a criminal case show affirmatively that a copy of the indictment was served on the defendant, and the defendant should take advantage of any such irregularity at the time, and if the objection is overruled, the fact should be preserved by a bill of exceptions: *Lytle v. Territory*, 2 W. T. 435.

Alleged error in admitting dying declarations cannot be reviewed: *Hartigan v. Territory*, 1 W. T. 447.

Only final orders, judgments, and decrees are reviewable: *Conway v. United States*, 2 W. T. 336.

**Crops.** See Executions and Proceedings Supplemental; Landlord and Tenant; Mesne Profits.

**Cross-bills.** See Equity.

**Cross-examination.** See Witnesses.

**Cruelty.** See Divorce.

**Curtesy.**

Curtesy attaches to an equitable estate in the wife: *Gilmore v. Gilmore*, 7 Or. 374.

It is no fraud on creditors for a husband to bar his curtesy by joining his wife in a deed on sale of her land: *Besser v. Joyce*, 9 Or. 310.

**Custody of Children.** See Divorce.

**Customs.**

Local customs must be alleged and proved; court does not take judicial notice: *Lewis v. McClure*, 8 Or. 273. No evidence in this case to establish custom of delivery of goods at the port of Olympia: *Williams v. Steamship Columbia*, 1 W. T. 95.

**Damages.** See Conversion; Fraud and Deceit.

When in action on contract the contract furnishes the measure of damages, no other will be adopted: *Zachary v. Swanger*, 1 Or. 92.

Price paid is the measure for breach of warranty of title to personalty: *Arthur v. Moss*, 1 Or. 193.

On affirmance of judgment on error, allowance of damages under the statute is denied when it is uncertain whether the writ of error was taken in good faith or not: *Coffin v. Hanner, Jennings, & Co.*, 1 Or. 236.

In suit against city for damages, a resident and tax-payer in city is not competent juror: *Garrison v. Portland*, 2 Or. 123; *Portland v. Kamm*, 5 Or. 362.

Jury instructed that plaintiff was entitled to damages for his whole injury or nothing: *Heath v. Glisan*, 3 Or. 64.

Loss of time, money expended or debts incurred, and bodily pain, the elements of damage for personal injuries: *Oliver v. N. P. T. Co.*, 3 Or. 84.

The object of damages for personal injury is compensation: *Id.*

Exemplary damages denied: *Id.*

Damages for breach of covenants, in deed; measure, and recovery: *Stark v. Olney*, 3 Or. 88; *Arrigoni v. Johnson*, 6 Or. 167.

For building railroad through land, and appropriating land: *Oregon Central R. R. Co. v. Wait*, 3 Or. 91; *Oregon etc. R. R. Co. v. Barlow*, 3 Or. 311.

For building canal, same: *Willamette Falls L. & C. Co. v. Kelly*, 3 Or. 99.

Jury instructed not to compromise contrary to convictions of truth: *Boydston v. Giltner*, 3 Or. 118.

Release of doubtful claim is sufficient consideration for release of claim for damages: *Williams v. Poppleton*, 3 Or. 139.

Damages for surgical malpractice: *Heath v. Glisan*, 3 Or.



**Damages (continued).**

64; *Boydston v. Giltner*, 3 Or. 118; *Williams v. Poppleton*, 3 Or. 139.

Where there was some evidence to show amount of damages found, new trial denied: *Williams v. Poppleton*, 3 Or. 139.

In slander, plea of truth as defense, if not proved, is an aggravation of damages: *Shartle v. Hutchinson*, 3 Or. 337.

Special damages for loss of prospective earnings, insufficient pleading: *Brown v. Moore*, 3 Or. 435.

Damages and compensation under ditch law of 1868 (c. 39, tit. 1, *Hill's A. L.*): *Seely v. Sebastian*, 4 Or. 25.

Proof of damages where judgment in default is rendered in action for breach of contract, is unnecessary: *White v. Northwest Stage Co.*, 5 Or. 99.

Damages for breach of contract, where the breach is total, may be given for the future as well as the past, though the time for full performance has not elapsed: *Tippin v. Ward*, 5 Or. 450.

Damages and benefits in an action for opening a street; evidence and instructions: *Portland v. Kamm*, 5 Or. 362; *Portland v. Lee Sam*, 7 Or. 397; *Portland v. Kamm*, 10 Or. 383.

Damages and benefits must be assessed separately in action reviewing proceedings to lay out a street: *Portland v. Kamm*, 5 Or. 362.

Essential allegations in an action for damages for false representations: *Rolfes v. Russel*, 5 Or. 400.

Price paid by vendee for an outstanding paramount title is the measure of damages for breach of covenant of warranty: *Arrigoni v. Johnson*, 6 Or. 167.

Measure of damages for establishing a road over private property: *Terwilliger v. Multnomah Co.*, 6 Or. 295; *Putnam v. Douglas Co.*, 6 Or. 328.

Measure of damages for overflowing plaintiff's land by erecting a dam: *Marsh v. Trullinger*, 6 Or. 356.

May be sued for by person specially injured by obstructing highway with toll-gate: *Milarkey v. Foster*, 6 Or. 378.

What damages are recoverable by mail carrier for neglect of company under its grant from the United States

**Damages** (continued).

to properly build the Dalles Military Road: *Schultz v. Military Road Co.*, 7 Or. 259.

Where the contract specifies the damages to be paid, all other damages are excluded: *Lung Louis & Co. v. Brown*, 7 Or. 326.

Forfeiture of five cents per cord on wood contract stipulated is liquidated damages: *Id.*

Subsequent attachment and sale by the same person may be shown in mitigation of damages, in an action against him for seizing the goods under a void attachment: *Morrison v. Crawford*, 7 Or. 472.

County Court has power to assess damages for taking of road material by supervisor from private lands for repairs: *Kendall v. Post*, 8 Or. 141.

The statute (sec. 29, c. 50, *Mis. Laws*, sec. 4093, *Hill's A. L.*) providing therefor is not unconstitutional for not providing trial by jury: *Id.*

Measure of damages for breach of warranty of engine is the damage naturally resulting: *Drake v. Sears*, 8 Or. 209.

Expense in putting up the defective engine and incurred by its failure to do the work, recoverable: *Id.*

Profits of business not an element of damage unless contemplated by parties: *Id.*

Damages for failure of county clerk to record mortgage: *Howe v. Taylor*, 9 Or. 288.

Refusal to allow certain evidence to reduce damages; held, an immaterial error where answer admitted damages to the extent found by the verdict: *Smith v. Cox*, 9 Or. 475.

Special damages for conversion not having been alleged, evidence or instructions relating thereto are irrelevant and erroneous: *Salmon v. Olds and King*, 9 Or. 488.

Profits that would necessarily have followed from the contract are actual damages recoverable when completion of the contract is prevented, and need not be pleaded specially: *Wisner v. Barber*, 10 Or. 342.

Exemplary damages may be recovered in action for assault and battery where malice is shown: *Hencky v. Smith*, 10 Or. 349.

Proof of social and pecuniary circumstances of defendant admissible in such cases: *Id.*

Damages for breach of building contract include loss of

**Damages (continued).**

rents and cost of completion, less amount payable under the contract, and the value of materials on hand: *Savage v. Glenn*, 10 Or. 440.

Exemplary damages for an act of servant, though willful and malicious, cannot be recovered from master unless he authorized or ratified the act, or unless chargeable with gross carelessness in the employment or retention of such servant: *Sullivan v. Oregon R'y & N. Co.*, 12 Or. 392.

Exemplary damages are recoverable only when complaint alleges malicious or wrongful act or reckless indifference: *Id.*

Measure for breach of contract to buy standing timber suitable for piling and ties is difference between contract and present market price: *Mackey v. Olssen*, 12 Or. 429.

Right of way having been given to the purchaser to reach the timber purchased, the cost of building a road is not an element of damage for breach on his part: *Id.*

Partial failure of consideration may be set up as a defense to an action on a bill of exchange, and the defendant recoup his damages, though unliquidated: *Davis v. Wait*, 12 Or. 425.

Prescriptive right to raise water to a certain stage is no defense to an action for damages for raising such stream above that stage: *Tucker v. Flouring Mills Co.*, 13 Or. 28.

Where verdict for damages is excessive, it is the duty of the court to set it aside; but its refusal to do so cannot be reviewed on appeal: *Nelson v. Oregon Railway etc. Co.*, 13 Or. 141.

Except where appellant has abandoned his appeal, damages are not allowed unless the appeal clearly appears to have been for delay: *Id.*

When damages are claimed in an action of replevin, and plaintiff recovers, the verdict is not defective that fails to find upon that question: *Prescott v. Heilner*, 13 Or. 200.

In such case it is presumed that the jury concluded that no damages were sustained: *Id.*

Market value is the measure of damages for destruction

**Damages** (continued).

of things that have such value: *Prettyman v. Railway etc. Co.*, 13 Or. 341.

But for property having no market value, for which recovery can be had, a different means of valuation must be resorted to: *Id.*

When attorneys' fees are recoverable as part of damages in an action on an injunction bond: *Olds v. Cary*, 13 Or. 362.

Claim for damages against a city for injury upon defective walk is not such a claim as must first be presented and disallowed by the city council before suit: *Sheridan v. Salem*, 14 Or. 328.

Municipal corporation is by statute liable for damages for injuries received by reason of its failure to keep streets in repair, unless specially exempted by its charter: *Id.*

In such action, evidence of repairing the *locus in quo*, by the officers of the city, is admissible on the question whether the walk was a common thoroughfare maintained by the city: *Id.*

Measure of damages in action under statute giving female over twenty-one years of age a right of action for her own seduction, is her entire loss, pecuniary, and in reputation and character: *Breon v. Henkle*, 14 Or. 494.

Damages in such case are not recoverable where both parties were equally guilty, but only where the defendant employed such artifice and deceit as was calculated to and did mislead a virtuous woman: *Id.*

Where a railroad company obtained right of way over a tract of land from one, by mistake supposing him the owner, and then entered and built its road over the same, the improvements so erected cannot be taken into consideration to enhance damages, in favor of the defendant in a suit afterwards brought against the true owner for condemnation: *O. R. & N. Co. v. Mosier*, 14 Or. 519.

Rights of consignee against common carrier for damages for injuries to goods injured in transit: *Williams v. Steamship Columbia*, 1 W. T. 95.

If sheriff make a false return, the party injured thereby has his action against the sheriff for damages: *Washington Mill Co. v. Kinnear*, 1 W. T. 99.



**Damages (continued).**

The right to damages on a replevin bond stated: *Boyer v. Fowler*, 1 W. T. 101; *Meigs v. Keach*, 1 W. T. 305.

Withholding dower entitles the claimant to damages: *Ebey v. Ebey and Beam*, 1 W. T. 185.

No statutory method of admeasuring such damages being prescribed, that adopted by the lower court approved: *Id.*

In an action for malicious prosecution and arrest, plaintiff cannot be asked to state the amount of damages he sustained; it is for the witness to state the facts and for the jury to estimate the damages: *Ferguson v. Tobey*, 1 W. T. 275.

In mitigation of damages claimed for continued imprisonment, it may be shown that plaintiff refused to be liberated on bail: *Id.*

Vendor who by oral contract has agreed to sell land to a person, the agreement being so far consummated that the latter is entitled to specific performance, is liable in damages if he subsequently fraudulently conveys to another: *Willey v. Morrow*, 1 W. T. 474.

The measure of damages in such case is the value of the land at time of the fraudulent conveyance: *Id.*

Woman injured on board a vessel by negligence of the officers can maintain libel *in rem* against the vessel for her damages: *Phelps v. City of Panama*, 1 W. T. 518.

The method of ascertaining the damages in such case set forth: *Id.*

Collision between vessels, occasioned by fault of both, the aggregate of damages should be borne equally by the vessels: *Meigs and Talbot v. Steamship Northerner*, 1 W. T. 78; *Puget Sound C. Co. v. Taylor*, 2 W. T. 93.

Action for damages for breach of contract to furnish liquors to be sold in violation of license law cannot be maintained by unlicensed liquor dealer: *Bach, Messe, & Co. v. Smith*, 2 W. T. 145.

In action by tenant against landlord for damages for failure to rebuild after premises are destroyed by fire, under lease for term of years providing that tenant is to make repairs, damages by elements excepted, an answer admitting the lease admits the right to nominal damages at least: *Hadlan v. Ott*, 2 W. T. 165.

**Damages (continued).**

On motion of plaintiff in such case for judgment on the pleadings, the court properly awarded nominal damages: *Id.*

On failure to furnish brick under contract, the measure of damages is the difference between contract price and price necessarily paid by the plaintiff for brick to finish his building: *Sweeney v. Jamieson*, 2 W. T. 254.

Where such contractor agreed to furnish a superior quality of brick for ornamental work on the building, and failed to do so, the plaintiff is entitled to recover for lessened value of building on account of the absence of such superior brick: *Id.*

But if, on the failure of the contractor to furnish such superior brick, plaintiff made no effort to obtain them elsewhere, but changed his plan of building, he is not entitled to such additional damages: *Id.*

In the absence of statute, the liability of a city for injuries received by reason of failure to repair streets is in dispute in different states, but in Washington Territory, following the opinion of the United States Supreme Court, the action may be maintained: *Hutchinson v. Olympia*, 2 W. T. 314.

Vendor of lots is liable to damages for deceit for fraudulently conveying lots of little value to purchaser after pointing out to the latter other more valuable lots, and inducing him to believe them the lots to be sold: *Phinney v. Hubbard*, 2 W. T. 369.

Measure, in such case, is the difference in value between the property purported to be sold and that actually sold: *Id.*

**Dams.** See *Mills*; *Water and Watercourses*.

Breakwater and dam are part of mill, so that a mechanic's lien attaches to mill for work thereon: *Willamette Falls etc. Co. v. Remick*, 1 Or. 169.

Right to use water implies right to dam and reasonably detain the water, but not to divert it: *Oregon Iron Co. v. Trullenger*, 3 Or. 1.

In action for damages for overflowing land by erecting a dam, the elements for which damages are recoverable: *Marsh v. Trullenger*, 6 Or. 356.

Agreement construed to permit the raising of a dam where

**Dams (continued).**

necessary to the enjoyment of mill privilege: *Brugger v. Butler*, 6 Or. 459.

Injunction against overflow caused by dam not granted where plaintiff's right was doubtful: *Tongue v. Gaston*, 10 Or. 328.

Injunction will be allowed against owner of overflowed land to restrain drainage thereof, when overflow is caused by dam of a mill-owner who has no right to overflow the lands by grant, license, or prescription: *Wattier v. Miller*, 11 Or. 329.

Covenant in a deed for division of water, and to repair and maintain certain dams, construed: *Salem Co. v. Salem F. M. Co.*, 12 Or. 374.

Injunction refused, to prevent one, jointly owning with another, rights to a stream, from building dam, but suit to compel equal division of water may be maintained: *Id.*

**Days of Grace.** See Bills and Notes.

**Debtor and Creditor.** See Assignment for Benefit of Creditors; Bankruptcy; Composition; Insolvency.

**Deceased Persons, Estates of.** See Administration; Administrators and Executors.

**Deceit.** See Damages; Fraud and Deceit.

**Declarations.** See Evidence.

**Decree.** Appeal and Error; Equity; Judgments and Decrees.

**Dedication.**

No particular time necessary to establish: *Parrish v. Stephens*, 1 Or. 59.

User by the public with assent of owner for such time that an interruption would be an injury, sufficient to establish: *Id.*

Private buildings erected on public ground, the legal title to which is in the public by dedication, may be removed by the public, but are not public property: *Id.*

Conditional dedication does not take effect or bind after-acquired land if condition fails: *Id.*

Dedication by occupant prior to Donation Law does not bind subsequent occupant: *Lownsdale v. Portland*, 1 Or. 397.

Exhibition and publishing of plat with spaces marked as streets and public squares is evidence of: *Id.*

**Dedication (continued).**

Proof of, by casual conversations and remarks of proprietor, to be closely scrutinized: *Id.*

Public dedication not presumed, must be shown by clear proof: *Id.*

Adoption of map by city, not including as a street the strip in controversy, binds the city: *Id.*

Map relied on to prove dedication must be shown to have been made or assented to by donors: *Leland v. Portland*, 2 Or. 46.

To be binding on proprietors of town site of Portland, dedication must have been made since September 27, 1850: *Id.*

Laying off streets and blocks, and selling blocks abutting on street, is dedication of street: *Portland v. Whittle*, 3 Or. 126.

Dedicator and his successors in interest are bound: *Id.*

Subsequent assent of dedicator cannot change street to public square: *Id.*

May be by parol; must be acts evincing clear intention: *Carter and Mason v. Portland*, 4 Or. 339.

What acts sufficient to constitute parol dedication: *Id.*

Formal acceptance by city not necessary; where the dedication is irrevocable, it need not be followed by immediate and continued user by the city: *Id.*

Nothing in the Oregon road laws limits or alters the right to dedicate roads: *Douglas County Road Co. v. Abraham*, 5 Or. 318.

Continued and uninterrupted user for greater period than the statute of limitations is evidence of the existence of the highway: *Id.* But see *Smith v. Gardner*, 12 Or. 221.

Slight change in the thread of the road will not defeat rights of the public: *Id.*

Public levee, duly dedicated, cannot be taken by railroad company for depots without consent: *Oregon R'y Co. v. Portland*, 9 Or. 231.

Owner of a tract conveyed by metes and bounds acquires no title to the soil of a street subsequently dedicated by his grantor, adjoining his tract: *Knott Bros. v. Jefferson St. Ferry Co.*, 9 Or. 530.



**Dedication (continued).**

Owner may make qualified dedication of road; may reserve right to keep a gate across: *Smith v. Gardner*, 12 Or. 221.

Permissive use of a way by portions of the community is a license, not a dedication: *Id.*

User and improvement for statutory period by city of a road within the city limits is not sufficient proof of acquiescence of owners to the use thereof as a street: *Heiple v. East Portland*, 13 Or. 97.

Facts examined, and held not to establish an intent to dedicate such road as a street: *Id.*

Grant or license to railroad company by legislative act to use a previously dedicated public levee in a city for terminal depots and docks, with reasonable limitations providing for the protection of the rights of the public, is not invalid as diverting the use of the property as dedicated, and is in aid of such use: *P. & W. V. R. R. Co. v. Portland*, 14 Or. 88.

The power of the legislature over property dedicated to public use is not absolute; it may regulate the use of the property or promote its improvement, but not divert the use from that for which dedicated: *Id.*

Upon such diversion, any person interested would be authorized to institute proper proceedings to enjoin it: *Id.*

Upon vacation of an alley, once dedicated to the public, by municipal corporation, the fee to the soil vests in equal proportions in abutting lot-owners: *Burmeister v. Howard*, 1 W. T. 207.

But if a different disposition of such vacated alley be made by ordinance upon petition of all the abutting owners, they are estopped thereby from setting up any claim in contravention to such ordinance: *Id.*

Recorded plat of town, clearly defining streets thereon, will not operate as dedication of a strip inclosed by lines on such plat, and marked "C," though extending from one street to another, and having lots abutting on it: *Robinson v. Coffin*, 2 W. T. 251.

Such inclosure of the space indicates an intention to withhold the land from public use: *Id.*

**Deeds.** See Acknowledgments; Boundaries; Contracts; Estoppel; Mistake and Accident; Mortgages; Reformation; Specific Performance.

1. THE CONTRACT TO CONVEY.
  2. EXECUTION AND DELIVERY.
  3. CONSIDERATION.
  4. DESCRIPTION OF PREMISES.
  5. COVENANTS.
  6. INTERPRETATION AND CONSTRUCTION.
  7. RECORDING.
  8. VALIDITY AND EFFECT.
1. THE CONTRACT TO CONVEY.

Agreement to convey free of encumbrances; grantor must record releases of mortgages or other liens on the property before he can tender deed: *Knighton v. Smith*, 1 Or. 276.

Vendor must tender deed, and vendee must tender price and make demand, before action lies by either: *Guthrie v. Thompson*, 1 Or. 353.

Mere agreement to sell does not give license to purchaser to enter: *Lee v. Summers*, 2 Or. 260.

Agreement to make quitclaim deed, when the grantor obtains title from a certain source, does not estop him from purchasing and holding an outstanding title: *Shively v. Welch*, 2 Or. 288.

Time is not of the essence of the contract, unless the language clearly indicates such to have been the intention of the parties: *Knott v. Stephens*, 5 Or. 235; *Snider v. Lehnherr*, 5 Or. 385.

When title is defective, and an incumbrance is on the land, offer of a warranty deed by the vendor is not a performance of a contract to convey by good and sufficient warranty deed: *Collins v. Delashmutt*, 6 Or. 51.

When title is derived through unrecorded deed, it is defective, and vendee need not accept: *Id.*

On breach by one party, the other need not specify in his notice of rescission the breaches relied on: *Id.*

Party in possession under imperfect deed may be granted specific performance, and in such case the deed is construed a contract to convey: *Hill v. Cooper*, 6 Or. 181.

Agreement to convey land, mill, etc., held to permit the raising of the dam where necessary to the user of the privilege granted: *Brugger v. Butler*, 6 Or. 459.

**Deeds (continued).**

Possession under an agreement to convey, the description being defective, held sufficient identification in a suit for specific performance: *Richards v. Snider*, 11 Or. 197.

Covenants to purchase certain property on or before five years, and that on payment the other party will make good and sufficient deed, are dependent covenants, and require performances or tender by either party before suit: *Powell v. D. S. & G. R. R. Co.*, 12 Or. 488; *S. C.*, 14 Or. 356.

Bond for a deed operates to convey equitable title to vendee, and the vendor holds the legal title as mere security for the payment of his debt: *Burkhart v. Howard*, 14 Or. 39.

Such vendee mortgaging the land conveys thereby to his mortgagee his security to the extent of the mortgage: *Id.*

In such case, the assignee after maturity of the vendee's notes acquires no more right than his assignor, and this, notwithstanding the mortgage was not recorded until afterwards: *Id.*

Where the terms of the contract require no more than that the vendor convey all the title he has, the vendee can insist on no more: *Thompson v. Hawley*, 14 Or. 199.

Contract for conveyance of land upon payment of certain sums gives vendee option on default of vendee to tender deed and sue for the money, or to foreclose the rights of the vendee under the contract: *Wood v. Mastick*, 2 W. T. 64.

**2. EXECUTION AND DELIVERY.**

Deed of corporation must be sealed with corporate seal, and purport to be act of the corporation: *Eagle Woolen Mills Co. v. Monteith*, 2 Or. 277.

But seal need be in no particular form, and words stating that the corporation affixed it, not indispensable: *Id.*

Deed executed by agent must be executed in name of principal: *Id.*

Sheriff in office when deed is due may execute the same after time for redemption: *Moore v. Willamette T. & L. Co.*, 7 Or. 359.

Deed of a corporation, sealed with its seal and subscribed

**Deeds (continued).**

by its president and secretary, declaring that they subscribe it for the corporation, will convey title: *Id.*

Certificate of proof of execution of unacknowledged deed must show that the witnesses were sworn and state the facts: *McIntyre v. Kamm*, 12 Or. 253.

Delivery is essential, whether consideration be good or valuable: *Fain v. Smith*, 14 Or. 82.

Delivery defined; the intention is the controlling element: *Id.*

After execution and acknowledgment, words or circumstances decisive of the intention of the grantor to consummate and part with deed constitute a delivery: *Id.*

Evidence considered and held to establish the execution and delivery of deed to the plaintiff: *Teller v. Brower*, 14 Or. 405.

**3. CONSIDERATION.**

Parol proof admissible to prove actual consideration differing from that in deed: *Brown v. Cahalin*, 3 Or. 45.

That expressed is *prima facie* the actual price, but presumption is disputable: *Stark v. Olney*, 3 Or. 88.

Conveyance in consideration of marriage is not a voluntary conveyance: *Bonser v. Miller*, 5 Or. 110.

Payment of an existing mortgage to which the deed is subject, and which is recited in the deed, is a valuable consideration as against creditors: *Miles v. Miles*, 6 Or. 266.

Contract to support grantor, in consideration of conveyance, will be enforced in equity, and the land charged, though a money consideration is expressed in the deed: *Watson v. Smith*, 7 Or. 448.

Deed of bargain and sale must be supported by a consideration which should be expressed therein: *Lambert v. Smith*, 9 Or. 185.

If not expressed in the deed, it may be averred and proved, but it must exist: *Id.*

The seal does not remove the necessity to prove the existence of the consideration: *Id.*

Deed made between parties to divorce suit, in consideration of not defending, is against public policy, and mistake therein will not be corrected in equity: *Phillips v. Thorp*, 10 Or. 494.



**Deeds (continued).****4. DESCRIPTION OF PREMISES.**

Ascertained boundaries and monuments control measurements, either of lines, surfaces, or angles: *Lewis v. Lewis*, 4 Or. 177.

Locality at which a lost stake was set may be ascertained in law as well as in equity: *Id.*

Clerical error in description will not vitiate, where intent can be seen from the deed: *Mathews v. Eddy*, 4 Or. 225.

When parol evidence is admissible to aid description: *Raymond v. Coffey*, 5 Or. 132.

Effect should be given to the intelligible portions, and the repugnant rejected: *Id.*; *Board S. L. Com. v. Wiley and Davis*, 10 Or. 86.

Metes and bounds control quantity, though not correctly stated in the deed: *Id.*

Description not so vague but that a surveyor might find the land with the deed does not render deed void: *Willamette C. & L. Co. v. Gordon*, 6 Or. 175.

Lands omitted by mistake in the description may be inserted by court of equity: *Ramsey v. Loomis*, 6 Or. 367.

Parol evidence is admissible to locate stake mentioned as starting-point in description otherwise definite: *Bochreinger v. Creighton*, 10 Or. 42.

Where the deed correctly described the premises, but added the statement that the tract lay in a certain township, whereas it lay partly in the adjoining township also, the latter part of the description may be rejected: *Board S. L. Com. v. Wiley and Davis*, 10 Or. 86.

"Lot 8, section 19, 4 north, 35 east." sufficient description when contract is accompanied by possession: *Richards v. Snider*, 11 Or. 197.

Tax deed, though the description of premises is defective, may be given in evidence by a defendant in ejectment to prove color of title in himself: *Smith v. Shattuck*, 12 Or. 362.

"Minter's Donation, township 1 south, range 2 west, 320 acres," is sufficient description in tax deed, if there is in such township a donation claim answering the description: *Minter v. Durham*, 13 Or. 470.

Lines and corners, mentioned in deeds made subsequent to a city ordinance fixing the lines and corners of

**Deeds (continued).**

abutting alley, are governed by the ordinance, and are not considered the lines and corners as they formerly existed: *Burmeister v. Howard*, 1 W. T. 207.

**5. COVENANTS.**

Where plaintiff was ousted, defendant not having had notice of the action, plaintiff must prove he was ousted by paramount title, when he sues for breach of warranty: *Stark v. Olney*, 3 Or. 88.

Damages for breach: *Id.*

One bound by general covenant of warranty cannot set up after-acquired title: *Taggart v. Risley*, 3 Or. 306; *S. C.*, 4 Or. 235; *Dolph v. Barney*, 5 Or. 192; *Wilson v. McEwan*, 7 Or. 87.

General covenant of warranty of premises cannot be explained to have been intended to apply to part of premises only: *Id.*

Construction of covenant to party and his heirs, held not to apply to his assigns, or to amount to a covenant for quiet enjoyment: *Moffitt v. Coffin*, 3 Or. 426.

Express covenant cannot be construed so as to extend its obligations by implication: *Id.*; *Failing v. Osborne*, 3 Or. 498.

So where a covenant was held to amount to general warranty, ouster necessary before action for breach: *Id.*

Grantor and his privies are estopped from denying title to which they have given general warranty: *Wilson v. McEwan*, 7 Or. 87.

Covenant for further assurance of title on receiving patent from United States construed: *Baker v. Woodward*, 12 Or. 3.

Covenant in a deed, dividing water and requiring building and repairing of dams, construed: *City of Salem Co. v. Salem F. M. Co.*, 12 Or. 374.

Covenant following upon and connected with the *habendum et tenendum* clauses in the words, "and the said B, his heirs and assigns, will warrant and by these presents ever defend," is sufficient to pass after-acquired title: *Mann v. Young*, 1 W. T. 454.

Action for breach of covenant for quiet enjoyment will not lie until there has been some hostile assertion of a better title: *Morgan v. Henderson*, 2 W. T. 367.

**Deeds (continued).****6. INTERPRETATION AND CONSTRUCTION.**

Deed reciting in the body thereof A as maker, but signed by B, is void: *Brauns v. Stearns*, 1 Or. 367.

Parol evidence is not admissible to aid in the interpretation of such deed: *Id.*

Construction of conveyance of water-power, etc., with right to enjoy flowage unobstructed: *Oregon Iron Co. v. Trullenger*, 2 Or. 311.

Same, right to "all the water which naturally flows below said mill": *Oregon Iron Co. v. Trullenger*, 3 Or. 1.

All parts of deeds should be considered together with surrounding circumstances to ascertain the intention of the parties: *Id.*

Meaning must be given to each term if possible: *Chapman v. Wilbur*, 3 Or. 326.

Construction of deed and confirmatory trust deed to land for the purpose of erecting an academy thereon: *Id.*

Whether the confirmatory deed alters the trust, and how far ratified: *Id.*

A deed must be taken by its "four corners" to interpret it, and the intention when discovered carried out: *Bohlman v. Coffin and Carter*, 4 Or. 313.

Party of the second part construed to mean party of the first part: *Id.*

Intelligible and consistent portions should be retained, and the repugnant and inconsistent rejected: *Raymond v. Coffey*, 5 Or. 132; *Board School Land Com'rs v. Wiley and Davis*, 10 Or. 86.

Conveyance of land, except strip reserved for road, held to pass the fee in the strip, subject to the right of way for road: *Abraham v. Abbott*, 8 Or. 53.

Two conveyances at same time, between the same parties, concerning the same subject-matter, should be construed together: *Kruse v. Prindle*, 8 Or. 158.

Reservation in deed of lot bounded by tide-water, of all privileges around said lot, construed to include wharfing rights: *Parker v. Rogers*, 8 Or. 183.

Deed purporting to pass the right, title, and interest of grantor, but with covenants of general warranty of the premises, held to operate as an estoppel as to the whole of the property conveyed: *Bayley v. McCoy*, 8 Or. 259.

**Deeds (continued).**

Grant of a right of way to enter, build, and repair water-ditches, etc., on grantor's land, construed: *Spear v. Cook*, 8 Or. 380.

The word "convey," in a deed, is equivalent to the word "grant": *Lambert v. Smith*, 9 Or. 185.

Words of quitclaim of dower by wife in husband's deed, held not to estop her from claiming an existing or after-acquired fee-simple interest: *Burston v. Jackson*, 9 Or. 275.

Deed of a mill and mill-site, by metes and bounds, with the appurtenances, held to include the easement of the right of overflowing adjoining lands: *Jackson v. Trullinger*, 9 Or. 393.

Vendor having no legal title, but a mere equitable right to take water off the land of another, his quitclaim deed thereto is an executory contract, and not an executed conveyance: *Glasford and Shield v. Baker and Cain*, 1 W. T. 224.

**7. RECORDING.**

Unrecorded deed is good between the parties: *Moore v. Thomas*, 1 Or. 201; *Manaudas v. Mann*, 14 Or. 450.

In absence of fraud, recorded conveyance has priority over unrecorded deed: *Id.*

Unacknowledged conveyance recorded is no notice to subsequent mortgagees: *Id.*

Mechanics who claim liens are estopped to deny notice of mortgage recited in owner's recorded deed: *Holmes v. Ferguson*, 1 Or. 220.

Unrecorded deed carries legal title as against all persons having notice: *Musgrove v. Bonser*, 5 Or. 313.

Recorded deed passes no title when taken with notice of prior unrecorded deed: *Id.*

Deed not entitled to record, recorded may operate as actual notice: *Baker v. Woodward*, 12 Or. 3.

Index is no part of the record; deed recorded and not indexed operates as notice: *Board of Com. v. Babcock*, 5 Or. 472.

Where title is derived through unrecorded deed not exhibited to the purchaser, it is defective, and he need not accept: *Collins v. Delashmutt*, 3 Or. 51.

Deeds and powers of attorney, executed and delivered in



**Deeds (continued).**

- 1845 and 1846, and not acknowledged or proved during the time of the provisional government, may be proved under the general laws to entitle them to record: *Wilson v. McEwan*, 7 Or. 87.
- Attaching creditor stands in all respects as *bona fide* purchaser, as to notice of unrecorded deed: *Boehreinger v. Creighton*, 10 Or. 42.
- Judgment lien, not taken *bona fide* without notice, does not prevail over deed unrecorded: *Baker v. Woodward*, 12 Or. 3.
- Deed not entitled to record does not take priority over mortgage entitled to record, made and recorded at same time without notice: *Fleschner v. Sumpter*, 12 Or. 161.
- Mortgage stands on same footing as deed with respect to recording: *Id.*
- Conveyance executed and acknowledged out of the state must be accompanied by certificate that it was executed and acknowledged according to the laws where done, to be recorded: *Id.*
- Where neither of two conveyances is recorded within five days from the time of its execution, the first recorded takes precedence: *Id.*
- In making proof of an unacknowledged deed for purpose of recording, witness must be sworn, and that fact stated in the affidavit: *McIntyre v. Kamm*, 12 Or. 253.
- Semble*, that a deed absolute in form, intended as a mortgage, could not be recorded as a mortgage; if recorded as a deed it operates as notice of grantee's claim: *Haseltine v. Espey*, 13 Or. 301.
- One holding unrecorded deed is not bound by decree quieting title in a suit subsequently brought against his grantor, where the adverse party had full notice, and the deed was recorded during the pendency of the suit: *Walker v. Goldsmith*, 14 Or. 125.
- Unacknowledged deed, though not entitled to record, passes title, and is a good conveyance except as against *bona fide* purchaser for value: *Manaudas v. Mann*, 14 Or. 450.
- Record of a deed showing it to bear a certain date must yield to the original deed showing a different date: *Skellinger v. Smith*, 1 W. T. 369.

**Deeds (continued).**

Best evidence of a deed and its contents before and after the registration laws is the deed itself, the execution and delivery having been first duly proved: *Id.*

**8. VALIDITY AND EFFECT.**

Deed unacknowledged and unrecorded good between the parties: *Moore v. Thomas*, 1 Or. 201; *Manaudas v. Mann*, 14 Or. 450.

Parties are bound by recitals contained in a deed: *Holmes v. Ferguson*, 1 Or. 220; *Graham v. Meek*, 1 Or. 325.

Deed of release, without covenants, made by a mere occupant, does not bind grantor's after-acquired title: *Lownsdale v. Portland*, 1 Or. 397.

Quitclaim deed conveys the interest of grantor only, not the land: *Farnum v. Loomis*, 2 Or. 29; *Baker v. Woodward*, 12 Or. 3.

Such deed does not estop grantee from showing that his grantor had no estate to which dower could attach: *Id.*

The making or agreeing to make a quitclaim deed of all interest the grantor acquires from a certain source does not prevent him from buying from another source, and holding same land: *Shively v. Welch*, 2 Or. 288.

Purchaser of part of an estate takes subject to servitudes visibly attached: *Oregon Iron Co. v. Trullenger*, 3 Or. 1.

Grantor seeking to show his deed voidable has no standing in equity while retaining purchase-money: *Kelly v. People's Transportation Co.*, 3 Or. 189.

After-acquired legal title in grantor inures to grantee when the deed clearly shows that it was meant to pass an absolute estate, although it contains no warranty: *Taggart v. Risley*, 4 Or. 235.

Deed in consideration of marriage not presumed fraudulent, but may be set aside for fraud, where both parties concurred in the fraud: *Bonser v. Miller*, 5 Or. 110.

Quitclaim deed passes all the estate that can be conveyed by bargain and sale, in Oregon: *Dolph v. Barney*, 5 Or. 192.

Deed containing covenant of warranty operates to transmit any after-acquired estate of grantor: *Id.*

Sheriff's deed is evidence of title, and recitals are *prima facie* evidence: *Id.*

**Deeds (continued).**

- School superintendent's deed, if regular on its face, is *prima facie* evidence of his power to convey: *Id.*
- Deed of school land commissioners conclusive on the state; but a party may have it set aside for fraud and false testimony on the part of the grantee in obtaining it: *Hurst v. Hawn*, 5 Or. 275.
- Fraudulent deed by husband before divorce, and after cause of suit accrued against him, may be set aside at the suit of the wife, after decree of divorce is granted to her: *Barrett v. Barrett*, 5 Or. 411.
- Deed made by judicial sale in county court, regular on its face, based upon a judgment apparently valid, gives color of title: *Hatcher v. Briggs*, 6 Or. 43.
- Deed of insane person is void, and may be impeached when offered in evidence in ejectment: *Farley v. Parker*, 6 Or. 105.
- Deed void as a conveyance may be admitted in evidence to identify land described: *Willamette Co. v. Gordon*, 6 Or. 175.
- Imperfect deed of party in possession may be construed as a contract to convey, and specific performance be granted: *Hill v. Cooper*, 6 Or. 181.
- Parol evidence is admissible to show a deed absolute on its face to be a mortgage: *Hurford v. Harned*, 6 Or. 362; *Stephens v. Allen*, 11 Or. 188; *Albany and Santiam W. D. Co. v. Crawford*, 11 Or. 243; *Wilhelm v. Woodcock*, 11 Or. 518; *Miller v. Ansenig*, 2 W. T. 22.
- Deed which is defective in the description of the premises may be used as evidence to prove unequivocal declarations contained therein, in a suit to reform the deed: *Ramsey v. Loomis*, 6 Or. 367.
- Deed of corporation sealed with its seal, and signed by the president and secretary, declaring it is executed by them for the corporation, will convey title: *Moore v. Willamette T. & L. Co.*, 7 Or. 359.
- Assignment for benefit of creditors, providing for sale of property, and payment of proceeds to unsecured creditors, *prima facie* valid; fraud is not presumed: *Kruse v. Prindle*, 8 Or. 158.
- Grant of a right of way for a mill-race is an easement, and the right to use water of streams crossing is re-

**Deeds (continued).**

- served in the grantor without express words: *Miller v. Vaughn*, 8 Or. 333.
- Deed, void as a bargain and sale for want of consideration expressed, may operate as a grant if it contain other apt words of conveyance: *Lambert v. Smith*, 9 Or. 185.
- Effect of deed must be determined by the court, and not left to the jury: *Johnson v. Shively*, 9 Or. 333.
- That plaintiff is not a *bona fide* purchaser because he claims under a quitclaim deed is a defense in equity, not at law: *Hass v. Sedlak*, 9 Or. 462.
- Fee-tail is abolished in Oregon; estates of inheritance are subject to general power of alienation by deed: *Rowland v. Warren*, 10 Or. 129.
- Deed of assignee in bankruptcy to property sold on foreclosure of prior mortgage conveys no title: *De Lashmutt v. Sellwood*, 10 Or. 319.
- Principles and evidence upon which a deed absolute on its face will be held a mortgage: *Stephens v. Allen*, 11 Or. 188; *Albany and Santiam W. D. Co. v. Crawford*, 11 Or. 243; *Wilhelm v. Woodcock*, 11 Or. 518.
- Purchaser under a quitclaim deed is not a *bona fide* purchaser without notice: *Richards v. Snyder and Crews*, 11 Or. 501; *Baker v. Woodward*, 12 Or. 3.
- Deed by one claiming under Donation Law, before receiving patent, with covenant of further assurance, operates to convey equitable title: *Bohlman v. Coffin and Carter*, 4 Or. 313; *Baker v. Woodward*, 12 Or. 3.
- Quitclaim deed conveys only the right of the grantor, and grantee having notice of equitable title in another takes subject thereto: *Baker v. Woodward*, 12 Or. 3.
- Unrecorded deed prevails over subsequent judgment lien not acquired in good faith without notice: *Id.*
- Quitclaim deed in chain of title is notice sufficient to put purchaser on inquiry: *Id.*
- Quitclaim deed or other instrument purporting to convey title is sufficient to constitute color of title as foundation for adverse possession: *Swift v. Mulkey*, 14 Or. 59.
- Quitclaim deed, by vendor having no legal title but mere equitable right to take water from the land of another, conveys no title, but is a mere executory contract,



**Deeds (continued).**

under which vendee gains no right but the right to demand possession and legal conveyance of the water right: *Glasford and Shield v. Baker and Cain*, 1 W. T. 224.

Alteration of a deed before delivering, but after same has passed out of maker's hands, avoids the deed: *Walla Walla Co. v. Ping*, 1 W. T. 339.

Privy to a deed is bound by the notice it imparts, whether he had actual notice or not: *Skellinger v. Smith*, 1 W. T. 369.

Statute of 1867, curing defective deeds, is constitutional, and applicable to the case of married woman's deed: *Id.*

Deed acknowledged before county auditor before 1867, whether valid or not, was cured by the statute of that year: *Kenyon v. Knipe*, 2 W. T. 422.

**Defamation.** See Slander and Libel.

**Default.** See Appeal and Error; Constitutional Law; Judgments and Decrees.

**Defenses.** See Answers and Defenses; Criminal Law; Pleading.

**Delivery.** See Deeds.

**Demand.** See Assumpsit; Bills and Notes; Contracts; Conversion; Counties; Municipal Corporations; Replevin.

**Demurrer.** See Equity; Pleading.

**Denials.** See Answers and Defenses.

**Dependent Covenants.** See Contracts; Deeds.

**Depositions.** See Reference.

Proceeding to take testimony *de bene esse*; notice to the adverse party required under the peculiar circumstances of the case: *In the Matter of T. J. Carter*, 3 Or. 293.

The proceeding should not be resorted to merely to ascertain what an adverse witness will testify: *Id.*

Deposition taken in different proceeding between other parties, to prove a marriage not admissible under section 819 of the Code (sec. 829, Hill's A. L.): *Murray v. Murray*, 6 Or. 26.

Certificate of commissioner to deposition taken out of the state need not conform to the code requirements of certificate to deposition taken in the state: *Heirs of Clark v. Ellis*, 9 Or. 128.

**Depositions** (continued).

Effect of amendment of 1885 (sec. 397, Hill's A. L.), in equity practice, is to repeal sections of the Code allowing parties, after issue is joined, to take depositions: *Marks & Co. v. Crow*, 14 Or. 382.

And it seems under the statute as amended, depositions *de bene esse* can no longer be taken, except in case where reference has been had: *Id.*

Deposition to be used in an admiralty case may properly be taken before a notary public: *Phelps v. Steamship City of Panama*, 1 W. T. 615.

Notice of ten days for taking such deposition held a reasonable notice in this case: *Id.*

Statute of United States providing for taking depositions is to be strictly construed; the certificate of the notary does not show that the witness was duly cautioned as by the statute required: *Id.*

Opening of deposition by the clerk of court, and placing same on file without an order of the court, precludes its being received in evidence: *Id.*

**Deputies.**

County clerk cannot appoint deputy with powers to act for him, unless authorized by statute: *State v. Smith*, 1 Or. 250.

Must transact business in the name of the principal: *Dennison v. Story*, 1 Or. 272.

Deputy county clerk was an independent officer under territorial act of 1856: *Willamette Co. v. Gordon*, 6 Or. 175.

His official signature was "deputy clerk," and his duties and office were distinct from the clerk: *Id.*

Constable may appoint deputy for particular service, but not to act for him generally: *Prickett v. Cleek*, 13 Or. 415.

Service of summons by "deputy constable," the record showing appointment of no such deputy to perform the service, is void: *Id.*

**Descent.** See Administration; Heirs; Public Lands; Wills.

**Devise.** See Administration; Legacies; Wills.

**Diligence.** See Notes and Bills; Laches; Negligence.

**Directors.** See Corporations; Schools.

**Disbursements.** See Costs and Disbursements.

**Discretion.** See Appeal and Error; Costs and Disbursements; Jury and Jury Trial; New Trials; Pleading; Practice.

**Dissolution.** See Corporations; Partnership.

**District Attorney.**

May sue in his own name as plaintiff in civil action on bail bond: *Hannah v. Wells*, 4 Or. 249.

It is his duty to prosecute suits for foreclosure of mortgages brought by school land commissioners, and he is entitled to the statutory fee therefor: *Claim of Ison*, 6 Or. 465.

The board of commissioners has authority to employ counsel to assist the district attorney in such cases: *Id.*

Actions brought on official undertakings are not for the recovery of fines and forfeitures, for which he is allowed ten per centum as fees by statute: *Claim of Ison*, 6 Or. 469.

Has no right to appear or claim fees in suits by board of commissioners for the sale of school land, in reference to school lands or funds, where the state is not a party: *Hazard's Appeal*, 9 Or. 366.

Improper remarks of, to jury, how exceptions must be taken: *State v. Lee Ping Bow*, 10 Or. 27; *State v. Anderson*, 10 Or. 448; *State v. Abrams*, 11 Or. 169.

Cannot intervene in a suit and claim forfeiture of a debt for usury, for the benefit of common school fund: *Sujette v. Wilson*, 13 Or. 514.

**District Courts.** See Constitutional Law; Courts; Judges; Judgments and Decrees; Jurisdiction.

Although under United States statute, the territorial district court is to be held at one place in each district, the legislature may provide for holding additional sittings in each county, if without expense to the United States: *Gird v. State*, 1 Or. 308.

Judicial district of King County having been abolished by order of the judges in 1856, the court thereof was merged into the court for the second district: *Boyer v. Fowler*, 1 W. T. 101.

**Ditches.**

Powers and jurisdiction of county commissioners under act of 1868 (c. 39, tit. 1, *Hill's A. L.*): *Seely v. Sebastian*, 4 Or. 25.

Compensation and damages: *Id.*

**Ditches (continued).**

Said act of 1868 is not unconstitutional as taking property for uses not public: *Id.*

Railroad, turning watercourse into a ditch, is bound to keep the ditch at all times in a condition to carry the water without overflowing adjoining lands: *Davidson v. O. & C. R. R. Co.*, 11 Or. 136.

This duty is not affected by lapse of time, or by the fact that other persons turn water into the ditch: *Id.*

**Divorce.**

1. JURISDICTION.

2. CAUSES.

3. ALIMONY AND PROPERTY RIGHTS.

4. CUSTODY OF CHILDREN.

5. PRACTICE AND EVIDENCE.

1. JURISDICTION.

Stipulation that party was divorced in a certain suit is an admission of the jurisdiction of the court to grant the divorce: *GrosLouis v. Northcut*, 3 Or. 394.

When the right of suit accrues by virtue of residence in the state for a year, under section 494 of the Code (sec. 498, *Hill's A. L.*), the plaintiff has a year thereafter in which to sue for causes therein referred to: *Jacobsen v. Jacobsen*, 11 Or. 454.

Supreme Court has no jurisdiction to review decree of divorce, but may review other proceedings in the suit: *Madison v. Madison*, 1 W. T. 60; *contra*, *Tierney v. Tierney*, 1 W. T. 568.

Divorce act forbidding Supreme Court to review final order of District Court is contrary to provisions of Organic Act, and to such extent void: *Tierney v. Tierney*, 1 W. T. 568.

Legislature of Oregon Territory had plenary power to grant divorce by special act, and the courts have no authority to review its action: *Maynard v. Valentine*, 2 W. T. 3; *Maynard v. Hill*, 2 W. T. 321.

To grant divorce does not impair the obligation of contracts: *Id.*

Nor does such action violate provisions of the ordinance of 1787, respecting contract rights and forbidding legislative interference with the primary disposal of the soil: *Id.*



**Divorce (continued).**

**2. CAUSES.**

Concealment by woman from her intended husband of the fact that she had been the mother of an illegitimate child, not such fraud as will annul marriage: *Smith v. Smith*, 8 Or. 100.

False accusation of unchastity is sufficient ground for divorce: *Id.*; *McMahan v. McMahan*, 9 Or. 525.

The fact that such accusations were made after parties separated is immaterial: *Id.*

Acts of cruelty, though presumed condoned by cohabitation after, are revived by repetition: *Atterberry v. Atterberry*, 8 Or. 224.

After reconciliation, any acts of cruelty creating reasonable fear of personal violence will revive condoned cruelty: *Id.*

Where adultery with a near relative is alleged as ground, it should be clearly proved: *Rickard v. Rickard*, 9 Or. 168.

Keeping a woman in the house with whom husband was groundlessly suspected and charged by the wife with adultery, held not cruelty to wife: *Id.*

Keeping persons in the house, against protest of wife, who habitually mistreat her and render her life burdensome, is cruelty of the husband, and ground for divorce: *Hall v. Hall*, 9 Or. 452.

Charge of unchastity, whereby wife acquired venereal disease and communicated same to husband, if false, is ground for divorce: *McMahan v. McMahan*, 9 Or. 525.

Actual violence or reasonable apprehension of bodily injury is necessary as cause for divorce on the ground of cruelty: *Cline v. Cline*, 10 Or. 474.

What is a personal indignity depends to some extent on the character and circumstances of the parties: *Id.*; *Adams v. Adams*, 12 Or. 176.

Cruelty must be unmerited and unprovoked, or out of proportion to the provocation: *Taylor v. Taylor*, 11 Or. 303.

The policy of the law is to sustain the marriage relation, and a cause for divorce must be clearly shown: *Id.*

Imprudent, unreasonable, or jealous conduct is not alone sufficient, necessarily; defendant must have evinced a malignant desire to annoy or harass: *Boon v. Boon*, 12 Or. 437.

**Divorce (continued).****3. ALIMONY AND PROPERTY RIGHTS.**

Plaintiff (husband) ordered to pay over \$250 for expenses of defendant in defending, and to pay her traveling expenses from distant state: *Smith v. Smith*, 3 Or. 363.

Whether under act of 1854 court had power to transfer lands of party to children: *GrosLouis v. Northcut*, 3 Or. 394; *Doscher v. Blackiston*, 7 Or. 403.

Where pleadings make no reference to property, court cannot transfer a particular tract: *Id.*

Disposition of real estate is incidental to divorce, but complaint must state the facts: *Id.*

Where pleadings and decree are silent as to real property, plaintiff acquires no right therein by the divorce: *Bamford v. Bamford*, 4 Or. 30; *Hall v. Hall*, 9 Or. 452.

A general decree for one third of the property of the defendant cannot be entered in granting the divorce, where the pleadings are silent as to such property: *Id.*; *Hall v. Hall*, 9 Or. 452.

Judgment roll must contain a description of the property adjudicated upon: *Id.*

Though divorce be granted, court may afterward decree division of property, if done in the same suit: *Id.*

That defendant had fraudulently conveyed away his property before suit for divorce was begun is not sufficient ground for opening decree of divorce, unless the fact was not known: *Id.*

After suit is ended and wife granted divorce, she may attack fraudulent conveyance, made by husband any time after cause of suit arose: *Barrett v. Barrett*, 5 Or. 411; *Weiss v. Bethel*, 8 Or. 522.

It is the peremptory duty of the court to decree one-third part of all real estate owned by the losing party to the other, if the prayer for the divorce is granted: *Wetmore v. Wetmore*, 5 Or. 469.

Third party to whom husband fraudulently conveys legal title may be made party defendant in suit by wife for divorce: *Id.*

Court cannot award more than one third of the losing party's property to the other: *Rees v. Rees*, 7 Or. 47.

Under act of 1854, court could direct husband to pay a sum of money in lieu of the wife's equitable interest

**Divorce (continued).**

- in land, standing in his name, in granting her a divorce, and acceptance estops her: *Brooks v. Ankeny*, 7 Or. 461.
- Woman is entitled to hold property earned by her after marriage, and to control the same herself: *Atterberry v. Atterberry*, 8 Or. 224.
- Decree of divorce being silent as to property, the right to property fraudulently concealed at that time may be afterward enforced in an original suit in equity: *Weiss v. Bethel*, 8 Or. 522.
- The plaintiff in such suit may make persons in possession, claiming adversely to her, parties defendant: *Id.*
- Delay of over thirteen years, with sufficient knowledge to be put on inquiry, is laches: *Id.*
- Mistake in deed between parties to a divorce suit made in consideration of not defending, will not be corrected by a court of equity: *Phillips v. Thorp*, 10 Or. 494.
- Where the plaintiff's principal object is to secure certain property rights, a divorce will be refused: *Adams v. Adams*, 12 Or. 176.
- Where plaintiff neglected to pay into court money for defense by wife within the time ordered by the court, but subsequently paid, and made showing by affidavit in excuse, it was error to dismiss the suit for his default: *Newhouse v. Newhouse*, 14 Or. 290.
- The showing of inability to pay constitutes sufficient excuse to purge the contempt, and the neglect was not contumacious or fraudulent: *Id.*
- Decree regarding realty, contrary to the allegations and proofs, must be reversed: *Bender v. Bender*, 14 Or. 353.
- Order requiring husband to pay wife's counsel fees, and a certain sum to trustees for her use during life, is sanctioned by the divorce act: *Madison v. Madison*, 1 W. T. 60.
- Husband having begun suit for divorce was ordered to pay into court certain sums for wife for expenses of her defense, and subsequently he dismissed the suit; the court properly entered judgment against him for reasonable expenses of wife, including counsel fees: *Thorndike v. Thorndike*, 1 W. T. 175.
- The amount of alimony is to be regulated by the facts as disclosed: *Tierney v. Tierney*, 1 W. T. 568.

**Divorce (continued).****4. CUSTODY OF CHILDREN.**

Decree assigning children to custody of one of the parties is appealable: *Pittman v. Pittman*, 3 Or. 472.

Court has full power; and mere fact of awarding children to party in fault raises no presumption of error: *Pittman v. Pittman*, 3 Or. 553.

Father is entitled to custody of minor child rather than maternal grandfather, wife being in fault: *Jackson v. Jackson*, 8 Or. 402.

Decree failing to provide for the care and custody of the minor children of the marriage is defective: *Boon v. Boon*, 12 Or. 437.

Order of District Court awarding custody and fixing allowance for support of child is interlocutory, and not subject to review; the child is the ward of the court: *Tierney v. Tierney*, 1 W. T. 568.

**5. PRACTICE AND EVIDENCE.**

Ten days' service in suit within the state is sufficient under the statute: *Rochester v. Rochester*, 1 Or. 307.

Property rights may be adjusted after divorce granted, but must be done in same suit: *Bamford v. Bamford*, 4 Or. 30.

No decree concerning the property can be entered where the pleadings are silent as to the existence of property: *Id.*; *Hall v. Hall*, 9 Or. 452.

Though the suit is based upon allegations which, if true, decide the defendant guilty of a crime, the charge is sufficiently proved by a preponderance of evidence: *Smith v. Smith*, 5 Or. 186.

Stipulation for divorce and custody of children is void: *Savage v. Savage*, 10 Or. 331.

Person, through her own default and negligence allowing statutory time for taking testimony to expire, cannot claim as a matter of right that the suit shall be continued, and the time extended for taking such evidence: *Id.*

Agreement not to defend is void as against public policy: *Phillips v. Thorp*, 10 Or. 494.

Demurrer to complaint is not such an admission of the charge as is meant in section 494 of the Code (sec. 498, *Hill's A. L.*), which provides that in certain cases the



**Divorce (continued).**

charge may be admitted by the defendant, and he may show in bar that it did not occur within a period fixed by the statute: *Rice v. Rice*, 13 Or. 337.

To avail himself of that provision, defendant must admit the charge, not merely to test its legal sufficiency, but as an actual fact: *Id.*

Defendant may file cross-bill and counterclaim, and demand and receive affirmative relief: *Dodd v. Dodd*, 14 Or. 338.

Plaintiff failing to establish her case was nevertheless awarded costs, it appearing that defendant was not without fault, and had property partly earned by plaintiff: *Bender v. Bender*, 14 Or. 353.

A decree of divorce is not subject to review on error, but there may be other questions involved which are reviewable: *Madison v. Madison*, 1 W. T. 60.

But the statute forbidding review of such decree is void, and error lies: *Tierney v. Tierney*, 1 W. T. 568.

The provisions of the Practice Act regarding waiver of jury trial, and requiring judge to state in writing conclusions of fact and law separately, does not apply to divorce cases: *Madison v. Madison*, 1 W. T. 60.

Former alleged marriage held not to be before the Supreme Court upon the record: *Tierney v. Tierney*, 1 W. T. 568.

Actions for divorce are proceedings at law, and the findings of the lower court stand as the verdict of a jury, not to be set aside unless manifestly contrary to the evidence: *Id.*

**Docket.** See Judgments and Decrees; Justice of the Peace.

**Documentary Evidence.** See Evidence.

**Dogs.** See Common Carriers.

**Domestic Animals.** See Animals.

**Domestic Relations.** See Divorce; Guardian and Ward; Husband and Wife; Infancy; Master and Servant; Parent and Child.

**Domicile.** See Elections; Public Lands.

**Donation Act.** See Public Lands.

**Dower.**

Woman does not relinquish her dower by signing and sealing, but not acknowledging, her husband's deed: *Moore v. Thomas*, 1 Or. 201.

**Dower.** (continued).

Grantee under quitclaim deed may show his grantor had no estate to which dower could attach: *Farnum v. Loomis*, 2 Or. 29.

Cannot attach to an equity, in Oregon: *Id.*; *Whiteaker v. Vanschoiack*, 5 Or. 113.

Assignment of, not necessary to right of action for, against grantee of husband denying the right to dower: *McKay v. Freeman*, 6 Or. 449.

The complaint need not, in addition to allegation that defendant wrongfully withholds possession, allege that he denies plaintiff's right: *Id.*

Widow is entitled to dower in donation claim, deeded away by husband alone after they had complied with the conditions of the Donation Act, but before he has obtained patent: *Id.*

Widow is entitled to dower in husband's half of donation claim, under section 4 of the act, where the husband dies before patent issues: *Love v. Love*, 8 Or. 23.

Before dower is assigned, widow has no estate in deceased husband's lands, and no right to rents; administrator is entitled to all the rents to pay debts: *Leonard v. Grant*, 8 Or. 276.

Dower of the common law is recognized by the laws of Washington Territory, and is to be assigned by the rules of the common law: *Ebey v. Ebey and Beam*, 1 W. T. 185.

Dower extends to donation claims, and the reserved right of eminent domain in the United States does not defeat the right of dower therein: *Id.*

Withholding dower entitles the claimant to damages: *Id.*

No statutory method of admeasuring such damages being prescribed, that adopted by the lower court approved: *Id.*

The act of November 9, 1871, abolished dower in Washington Territory, by declaring that "neither dower or curtesy shall hereafter accrue": *Hamilton v. Hirsch*, 2 W. T. 223.

Such legislation is taking away an expectancy, not a vested right: *Id.*

**Drafts.** See Bills and Notes.

**Drunkenness.** See Negligence.

**Duress.** See Fraud and Deceit.

By threats, need not be by such threats as would operate on a person of ordinary firmness, but it is duress if they do in fact compel the threatened person: *Parmen-tier v. Pater*, 13 Or. 121.

Debtor by threats and menaces obtaining relinquishment of debt from creditor of weak mind; the release is invalid though the creditor was not insane: *Id.*

**Dying Declarations.** See Evidence.

**Easements.** See Eminent Domain; Water and Water-courses.

One who has an easement has the right to enter the servient estate when necessary to repair: *Thompson v. Uglow*, 4 Or. 369.

Owner of mill-race and right of way may enter and dig up and use adjacent soil when necessary: *Id.*

Cannot dig or use such soil when there is any other mode of repairing: *Id.*

Grant of a right of way for a mill-race is a mere easement, and does not include a right to appropriate water flowing on grantor's land: *Miller v. Vaughn*, 8 Or. 333.

Express reservation of such water is not necessary in the grant: *Id.*

Grant of right of way, with right to enter, etc., for water ditches, construed: *Spear v. Cook*, 8 Or. 380.

Right to overflow adjoining lands is an easement, and will pass as an appurtenant by grant of a mill with the appurtenances: *Jackson v. Trullinger*, 9 Or. 393.

Such right of overflow, and the dam and rights of flowage, are incident to the enjoyment of a mill granted, and pass without the word "appurtenances": *Id.*

In action to condemn land for railway, an easement of right of way, and not the land itself, is acquired: *O. R. & N. Co. v. Oregon Real Estate Co.*, 10 Or. 444.

One claiming a right to overflow lands by erecting a dam must show his right by grant, prescription, or license: *Wattier v. Miller*, 11 Or. 329.

Title of occupant of servient estate cannot be attacked by one showing no right to the easement: *Id.*

Such claimant cannot enjoin drainage by one having possession of the overflowed land: *Id.*

Grant of easement is presumed from an adverse enjoy-

**Easements** (continued).

ment for the statutory period: *Johnson v. Knott*, 13 Or. 308.

Payment of taxes by the owner of the soil is not inconsistent with the acquisition of such right: *Id.*

**Ejectment.**

Donee under Donation Act may maintain, against one who shows no title but possession: *Keith v. Cheeny*, 1 Or. 285.

Possession of defendant is presumed lawful, and plaintiff must recover on strength of his own title: *McEwan v. Portland*, 1 Or. 300.

City of Portland may maintain action to recover public square dedicated: *Leland v. Portland*, 2 Or. 46.

Plaintiff need not set out his muniments of title: *Pease v. Hannah*, 3 Or. 301.

Where defendant set up title to undivided interest, required to show what interest: *Id.*

Defendant claiming to own undivided one fifth must set out names of his co-tenants: *McCown v. Hannah*, 3 Or. 302.

Where plaintiff's title is denied, burden is on him to show title in himself: *Farley v. Parker and Sutherland*, 4 Or. 269.

Where both parties derive title from the same person, neither can deny the title in such person: *Dolph v. Barney*, 5 Or. 192.

Decree which operates as a deed, admissible in evidence to prove title: *Id.*

Tenant in common may recover the whole in action against a stranger: *Id.*

Proper remedy to recover for use and occupation, unless relation of landlord and tenant, express or implied, exists: *Espy v. Fenton*, 5 Or. 423.

Deed of insane person is void, and when offered to prove title in ejectment may be impeached: *Farley v. Parker*, 6 Or. 105.

Plaintiff must set forth in his complaint the nature of his estate, or his action will be regarded as forcible entry and detainer: *Thompson v. Wolf*, 6 Or. 308.

Person ejected cannot, having entered the land with the intention of holding adversely, on his being ousted, re-



**Ejectment (continued).**

move a building erected by him, though of wood on posts or blocks: *Doscher v. Blackiston*, 7 Or. 143.

Defendant may plead inconsistent defenses in real actions: *Moore v. Willamette T. & L. Co.*, 7 Or. 355.

May plead ownership in himself and in another, and proof of either will defeat the action: *Id.*

Judgment in favor of defendant is conclusive as to the lawfulness of his title and entry when brought in question collaterally: *Hill v. Cooper*, 8 Or. 254.

Defendant is not allowed to give in evidence facts showing his own title under mere denial of plaintiff's title, and is confined to proof of the weakness of the latter: *Phillippi v. Thompson*, 8 Or. 429.

Defendant may introduce deeds recited in a confirmatory deed relied on by plaintiff, for the purpose of showing the true boundaries of the land claimed by the plaintiff: *Id.*

Under section 316, Civil Code (sec. 319, Hill's A. L.), no mere equitable right or equitable estoppel can be pleaded as a defense: *Newby v. Rowland*, 11 Or. 133.

Ejectment is not the remedy by which a widow can get possession of dwelling-house for her quarantine: *Aiken v. Aiken*, 12 Or. 203.

In contest between legal titles, defendant may assail plaintiff's title, and assume the burden of proving notice and want of consideration: *McIntyre v. Kamm*, 12 Or. 253.

Defendant claiming under statute of limitations may give in evidence a tax deed to show color of title accompanied by possession, though the description is imperfect: *Smith v. Shattuck*, 12 Or. 362.

Co-tenants cannot join as plaintiffs in ejectment, but the defect is waived by answering over: *Minter v. Durham*, 13 Or. 470.

Defendant cannot show mistake in the description in his deed, or vary its terms by parol proof contradicting it, the deed not having a latent ambiguity: *Holcomb v. Mooney*, 13 Or. 503.

It is not error to permit an amendment on the trial by striking out an allegation and denial of defendant's possession in the complaint and the reply, where there is

**Ejectment** (continued).

no prejudice to substantial rights: *Swift v. Mulkey*, 14 Or. 59.

Where plaintiff proves title, he is entitled to possession, unless defendants show a better title or adverse possession for ten years: *Id.*

Adverse possession for the statutory period confers title sufficient to maintain ejectment: *Joy v. Stump*, 14 Or. 361.

An unacknowledged deed, to be followed by proof of notice thereof, is admissible as proof of title as against one holding a subsequent recorded deed: *Manaudas v. Mann*, 14 Or. 450.

Action, under the statute, is not an action to try merely the abstract legal title to the soil, but to determine who is entitled to the possession: *Burmeister v. Howard*, 1 W. T. 207.

Holder of legal title may not recover, if by his acts the equitable title be in the adverse party: *Id.*

Where plaintiff claims under certificate of purchase of public lands, defendant may plead, by way of inducement, a state of facts upon which the commissioner of the general land-office caused such certificate to be canceled: *Hays v. Parker*, 2 W. T. 198.

In such action, when it appears that the subject-matter thereof is pending before the interior department of the the United States, and not fully determined, the court should dismiss the action at plaintiff's cost: *Id.*

**Elections.** See *Mandamus*; *Quo Warranto*; *Practice*.

Votes of precinct cannot be rejected because no poll-book was sent to county clerk: *Day v. Kent*, 1 Or. 123; *Cresap v. Gray*, 10 Or. 345.

If it can be ascertained who has majority, irregularities in the returns will not defeat: *Darragh v. Bird*, 3 Or. 229; *Cresap v. Gray*, 10 Or. 345.

On contest, the office will be given to him who has the right by the votes: *Territory v. Pyle*, 1 Or. 149; *Darragh v. Bird*, 3 Or. 229.

On contest, the notice is the commencement, and court has no jurisdiction to hear any motion in the case until its service and return: *Myers v. Warner*, 3 Or. 212.

**Elections (continued).**

Notice must state definite time for hearing; additional indefinite words surplusage: *Id.*

So when the time stated is "at the next term of the Circuit Court of said county, or as soon as said judge will hear the same," the indefinite words may be rejected: *Id.*

Judge at chambers may do whatever court might do in term time in contest cases: *Id.*

Plaintiff having named a day for hearing, his motion for earlier day denied: *Id.*

*Mandamus* not proper remedy to try ultimate right to office: *Warner v. Myers*, 3 Or. 218; *S. C.*, 4 Or. 72.

An answer denying the legality of the election of the petitioner will not abate the writ of *mandamus*: *Id.*

Certificate of canvassers is evidence of what was decided by them: *Id.*

Powers of sheriff in office cease when served with certificate of the election of successor: *Id.*

Contest pending does not stay the effect of such certificate: *Id.*

Elector should vote for county officers only in precinct where he resides: *Darragh v. Bird*, 3 Or. 229.

Pardon does not restore person convicted of felony to rights of elector: *Id.*; *contra*, *Wood v. Fitzgerald*, 3 Or. 568.

What constitutes a residence: *Darragh v. Bird*, 3 Or. 229; *Wood v. Fitzgerald*, 3 Or. 568.

Person duly challenged may not vote until sworn: *Darragh v. Bird*, 3 Or. 229.

After the hour for closing polls, they cannot be opened again: *Id.*

Party attacking a voter who has voted must show he is disqualified: *Id.*

Residence of person in employ of United States: *Id.*

Rejected votes should appear on poll-book: *Id.*

Naturalized person, a voter on receiving final papers: *Id.*; *Wood v. Fitzgerald*, 3 Or. 568.

Right of judges to reject votes: *Id.*

On contest, will of majority as expressed by their votes will be given effect: *Id.*

Inquiry on contest, limited to the votes returned on poll-book: *Id.*

**Elections (continued).**

Limitations of suffrage to white persons by state constitution is abrogated by the fifteenth amendment of the United States constitution: *Id.*

Costs cannot be allowed either party in contested election case: *Id.*

Municipality has no power to try contest of city election, unless expressly authorized: *Robertson v. Groves and Corvallis*, 4 Or. 210.

The right is not implied from its right to provide for election of city officers, nor from its general authority to pass by-laws and ordinances: *Id.*

Indictment for illegal voting under section 630 of the Criminal Code (sec. 1846, Hill's A. L.): *State v. Bruce*, 5 Or. 68.

*Mandamus*, not injunction, proper remedy to contest election selecting county seat: *McWhirter v. Brainard*, 5 Or. 426.

Jurisdiction of municipal body, having power to judge of the qualifications and election of its members, is not exclusive; Circuit Court has power to inquire into the right to office under section 354 of the Code (sec. 357, Hill's A. L.): *State v. McKinnon*, 8 Or. 493.

Ballot on colored paper is illegal at any election under the general laws: *Id.*

In case of a tie, neither candidate is elected, and neither can exercise the duties of office until the right is determined by lot, and the person declared duly elected: *Id.*

On review, alleged error of law in counting votes by common council of Portland cannot be retried, the city charter making the council the final judge: *Simon v. Portland Com. Council*, 9 Or. 437.

Loose tally-sheets returned in the poll-books cannot be considered by canvassers as part of the returns: *Simon v. Durham*, 10 Or. 52.

Precinct omitted by canvassers as not returned when they canvassed may be counted by the court on contest, having in the mean time been duly returned: *Cresap v. Gray*, 10 Or. 345.

Vote of a precinct should be counted, though returned more than ten days after the election, if regular and the vote in that precinct was regularly cast: *Id.*



**Elections (continued).**

Act giving judge power to hear contest in vacation is not unconstitutional: *Id.*

Act requiring registry by voters as a prerequisite to voting is void: *White v. Commissioners*, 13 Or. 317.

Requirement to register on a previous day adds an illegal condition to the qualifications prescribed by the constitution: *Id.*

Duty of county clerk to make out notices of election may be enforced by *mandamus*: *State v. Ware*, 13 Or. 380.

Circumstance of a person voting at a presidential election in another state would not establish his residence out of the territory against his sworn statements of residence and unchanged intention of returning: *Clarke v. Territory*, 1 W. T. 68.

Act of Congress, 1869, regulating elections in Washington Territory, had the effect of changing the time for elections of county and other officers: *Davidson v. Carson*, 1 W. T. 307.

**Embezzlement.**

Embezzlement is proper term to describe the offense when an agent fraudulently converts the money of his employer: *State v. Sweet*, 2 Or. 127.

**Eminent Domain.** See Constitutional Law; Municipal Corporations; Public Lands; Railroads.

1. THE POWER AND ITS NATURE.

2. PROCEEDINGS AND PRACTICE.

3. COMPENSATION AND DAMAGES.

1. THE POWER AND ITS NATURE.

In action to condemn, plaintiff cannot disparage defendant's title: *Willamette Falls C. & L. Co. v. Kelly*, 3 Or. 99.

Plaintiff must make all owners parties, and cannot take advantage by his neglect: *Id.*

Condemnation must be for public use; void if for private use: *Oregon Cascade R. R. Co. v. Baily*, 3 Or. 164.

Corporation has no greater right in property condemned than in property purchased: *Id.*

Property held by one corporation for public use, not generally liable to condemnation: *Id.*

Corporation authorized as carrier, not necessarily limited to one side of river at portage: *Id.*

**Eminent Domain** (continued).

Has no exclusive right to use of right of way not necessary to its business: *Id.*

Land voluntarily abandoned by corporation is liable to condemnation by another: *Id.*

Judicial condemnation, not exercised when agreement as to purchase can be had: *Oregon Cascade R. R. Co. v. Baily*, 3 Or. 178.

Mines of precious metals belong to the eminent domain of the sovereignty: *Gold Hill I. M. Co. v. Ish*, 5 Or. 104.

Statute authorizing establishing of private road over land of another without consent is void: *Douglas Co. Road Co. v. Abraham*, 4 Or. 318.

County Court has no jurisdiction to try questions of eminent domain: *C. & G. Road Co. v. Douglas Co.*, 5 Or. 280.

Power of County Court to lay out road over road owned by private company: *Id.*

Corporation cannot appropriate highway established by dedication without applying to the County Court: *Douglas Co. Road Co. v. Abraham*, 5 Or. 318.

The paramount control of streets in a city and roads in the country is in the legislature: *East Portland v. Multnomah County*, 6 Or. 62.

The legislature may transfer its control of city streets to the municipality: *Id.*

Taking property for roads without awarding damages before deducting benefits is constitutional: *Putnam v. Douglas County*, 6 Or. 328.

Private corporation, by agreement with County Court under the statute, may locate its road part of the way over a public highway, acquiring thereby a common right of user: *D. C. R. Co. v. C. & G. R. Co.*, 8 Or. 102.

This, though another company, without the agreement, has already located thereon: *Id.*

Without agreement with the authorities, company cannot appropriate to its exclusive use public grounds duly dedicated: *Oregon R'y Co. v. Portland*, 9 Or. 231.

The statute does not contemplate a taking of such public property when consent cannot be obtained, and using the same to the subversion of such public use: *Id.*

Appropriation of public levee for depots, etc., without

**Eminent Domain** (continued).

agreement, is an obstruction of the public rights not permitted by the statute: *Id.*

Legislature cannot authorize appropriation without compensation first assessed and tendered: *Oregonian R'y Co. v. Hill*, 9 Or. 377.

Strict compliance with the statute is necessary: *Id.*

Evidence of an attempt to agree upon compensation is a prerequisite to action: *O. R. & N. Co. v. Oregon Real Estate Co.*, 10 Or. 444.

Judgment for the land absolutely cannot be rendered; an easement of right of way only is secured: *Id.*

The state acquires title to lands gradually submerged by the sea: *Wilson v. Shiveley*, 11 Or. 215.

Grant by the legislature to railroad company of the use of public levee previously dedicated to the public in a city, providing for the protection of the rights of the public in accordance with the dedication, is not invalid, and is not a diversion of the public use: *P. & W. V. R. R. Co. v. Portland*, 14 Or. 188.

Railroad Company incorporated by special act may, if it so elects, proceed to condemn lands under the general statute: *Cascades R. R. Co. v. Sohns*, 1 W. T. 557.

**2. PROCEEDINGS AND PRACTICE.**

Parties may consent to try issues as to whether the land is subject to appropriation, and its value, together, though statute contemplates separate trials: *Oregon Cascade R. R. Co. v. Baily*, 3 Or. 164.

Duties of jurors on viewing premises, stated: *Id.*

When plaintiff sues to condemn sixty feet in width, cannot prove and ask verdict for value of forty-five feet: *Id.*

Statement furnished assessor not admissible to prove value: *Id.*

Assessment roll not admissible to prove value: *Id.*

Land held by one corporation defendant, plaintiff corporation cannot show that defendant holds solely for monopoly and to prevent competition: *Id.*

Forfeiture by one corporation cannot be tried in action to condemn by another: *Id.*

Too late after verdict to claim that jury did not have a full view of premises: *Oregon Cascade R. R. v. Oregon Steam Nav. Co.*, 3 Or. 178.

**Eminent Domain** (continued).

Defendant was permitted to open and close under certain pleadings: Oregon & Cal. R. R. Co. v. Barlow, 3 Or. 311.  
Money paid into court to satisfy judgment under protest ordered paid to defendant: Id.

Defendant cannot on same trial contest right to condemn and try question of damages: Oregon Central R. R. Co. v. Wait, 3 Or. 428.

Value of land taken, irrespective of improvement thereof, is the only damage, when benefits and damages to other lands of defendant are equal: Id.

Only on payment into court of damages assessed can court render judgment condemning the lands, and no judgment not in accordance with the statute can be given: Oregonian R'y Co. v. Hill, 9 Or. 377; Oregon R'y Co. v. Bridwell, 11 Or. 282.

Judgment *in personam*, without assessment of damages, cannot be rendered by default: Id.

Verdict in action to condemn land for railroad, what sufficient: Oregon R'y Co. v. Bridwell, 11 Or. 282.

Judgment *in personam* not permissible; should appropriate right of way after damages assessed: Id.

**3. COMPENSATION AND DAMAGES.**

Neither railroad nor defendant is obliged by law to fence their common boundary, and the expense of fencing is not to be considered as element of damages: Oregon Central R. R. Co. v. Wait, 3 Or. 91; S. C., 3 Id. 428.

Value of land taken, and amount of injury in excess of benefits resulting from the construction of railroad, is the compensation to be allowed: Id.; Willamette Falls C. & L. Co. v. Kelly, 3 Or. 99.

If plaintiff does not make all owners defendants, it is no ground for reducing damages: Willamette Falls C. & L. Co. v. Kelly, 3 Or. 99.

Water power taken or rendered less valuable may be considered in estimating damages: Id.

Value at commencement of the action is the amount to be paid: Or. & Cal. R. R. Co. v. Barlow, 3 Or. 311.

Estimate should not include timber cut down by plaintiff: Id.

Danger from fire or cost of removal of barns may be considered: Id.



**Eminent Domain** (continued).

Water ponded on defendant's land by improper construction not to be considered; otherwise, if result follows from proper construction: *Id.*

Measure of damages by reason of opening road: *Terwilliger v. Multnomah County*, 6 Or. 295; *Putnam v. Douglas County*, 6 Or. 328.

Damages and benefits on opening street: *Portland v. Kamm*, 5 Or. 362; *Van Sant v. Portland*, 6 Or. 395; *Portland v. Lee Sam*, 7 Or. 397; *Portland v. Kamm*, 10 Or. 383.

Tender and payment into court is an admission of damages to the amount of the tender: *O. R. & N. Co. v. Oregon Real Estate Co.*, 10 Or. 444.

Where railroad has once paid a person afterwards ascertained not to be the owner, in an action against the true owner, the latter cannot enhance his damages by proving the value of the improvements built by the company in the mean time: *O. R. & N. Co. v. Mosier*, 14 Or. 519.

**Employers and Employees.** See Master and Servant.

**Entry.** See Easements; Ejectment; Evidence; Judgments and Decrees; Public Lands.

**Equalization.** See Taxation.

**Equitable Estoppel.** See Estoppel.

**Equity.** See Accounting; Actions and Suits; Appeal and Error; Boundaries; Cloud on Title; Complaints; Corporations; Divorce; Fraud and Deceit; Fraudulent Conveyances; Injunction; Judgments and Decrees; Jurisdiction; Liens; Lost Papers; Mistake and Accident; Mortgages; Notice; Pleading; Practice; Quiet-ting Title; Reformation; Rules of Court; Specific Performance; Trusts and Trustees.

1. PRINCIPLES AND JURISDICTION.

2. PLEADING.

3. PRACTICE.

1. PRINCIPLES AND JURISDICTION.

Where one of two must suffer by the act of one, it should be he who caused the injury: *Coleman v. Stark*, 1 Or. 115.

Where a court of law has taken jurisdiction, equity will not interfere, where jurisdiction is concurrent, and there

**Equity (continued).**

is adequate remedy at law: *Wells, Fargo, & Co. v. Wall*, 1 Or. 295.

Equity will not relieve from effects of ignorance of a fact, in absence of mistake, accident, or fraud: *Fahie v. Pressey*, 2 Or. 23.

Equity will entertain jurisdiction in absence of remedy at law to set aside void tax deed, or to enjoin a void sale for taxes: *King v. Portland*, 2 Or. 146.

Equity will not review or correct the proceedings of directors of a corporation on the ground of fraud, unless there be ground for the displacement of the officers, or for a final winding up of the affairs of the corporation: *Hedges v. Paquett*, 3 Or. 77.

Bills for review are original suits under the Code, and defense is made by answer: *White v. Allen*, 3 Or. 103.

To set aside a voidable deed, application should be addressed to equity side of the court: *King v. Peoples' Trans. Co.*, 3 Or. 189.

A grantor who seeks to show his own deed is voidable has no standing in equity while he retains the purchase-price: *Id.*

Not all facts that constitute defense will afford affirmative equitable relief: *Kennard v. Sax*, 3 Or. 263.

Bills for review are entertained by virtue of the original not appellate jurisdiction of the Circuit Court: *Id.*

Where judgment erroneous, but debt justly owing, equity will not interfere: *Id.*

Except for error appearing of record, bills for review are not entertained without a showing of excuse for not having presented the facts for determination on former trial: *Norton v. Harding*, 3 Or. 361.

When equity relieves from contract for sale of land where amount falls short: *Failing v. Osborne*, 3 Or. 498.

By dispensing with the classification of bills, the Code does not take away any cause of suit: *Heatherly v. Hadley and Owen*, 4 Or. 1.

Having obtained jurisdiction for one purpose, equity will hold it for all purposes connected with the transaction: *Id.*; *Howe v. Taylor*, 6 Or. 284; *Phipps v. Kelly*, 12 Or. 213.

To ascertain where a lost stake was set may be deter-

**Equity (continued).**

mined in law as well as in equity: *Lewis v. Lewis*, 4 Or. 177.

Equity alone can protect the franchise of a road company from proceedings to lay out county road: *C. & G. Road Co. v. Douglas Co.*, 5 Or. 280.

Equity can, and under statute must, declare forfeiture for usury: *Chapman v. State*, 5 Or. 432.

Will make contract operate according to the intent, but will not reconstruct void contract: *Evarts v. Steger*, 6 Or. 55.

Jurisdiction to establish lost instruments is not taken away by statute allowing secondary evidence of the contents: *Howe v. Taylor*, 6 Or. 284.

Having acquired jurisdiction to establish lost official bond, equity will administer complete relief, and decree payment by sureties of their liability thereon: *Id.*

Equity will entertain jurisdiction of sale fraudulent for deceit, although an action for deceit would lie: *Smith v. Griswold*, 6 Or. 440.

A court of equity is the proper forum for administering relief against stockholders in favor of creditors of a corporation: *Bush v. Cartwright*, 7 Or. 329.

Suit may be maintained by wife to recover her one third of property owned by husband at time of divorce, unknown to her at that time: *Weiss v. Bethel*, 8 Or. 522.

Equity will not set aside a sale under a judgment void on its face, where there is a remedy by ejectment: *Farris v. Hayes*, 9 Or. 81.

Creditor's bill on the ground of fraud, to set aside fraudulent decree and sale where plaintiff has acquired a lien by attachment, will give equity jurisdiction, though there may be a remedy at law, and though no execution is issued: *Bremer & Co. v. Fleckenstein and Mayer*, 9 Or. 266.

Equity will assume jurisdiction to complete a dissolution and accounting between partners, partly effected, but not fully accomplished: *Gleason v. Van Aerman*, 9 Or. 343.

Relief against a trespass, remediable by damages at law, cannot be had in equity: *Weiss v. Jackson Co.*, 9 Or. 470; *Smith v. Gardner*, 12 Or. 221.

**Equity (continued).**

Equity jurisdiction and remedies in case of actual or constructive fraud: *Shively v. Parker*, 9 Or. 500.

Objection that plaintiff has a remedy at law is waived by pleading to the merits without such defense: *Kitcherside v. Myers*, 10 Or. 21; *Baker v. Woodward*, 12 Or. 3.

Homestead claimant is entitled to relief in equity against one who keeps him from entering, without title: *Id.*

Remedy for damage by injunction must be found at law, not in equity: *Ruble v. Coyote G. & S. M. Co.*, 10 Or. 39.

Tax-payer is entitled to sue in equity to prevent fraudulent or illegal use of county funds: *Carman v. Woodruff*, 10 Or. 133; *White v. Commissioners*, 13 Or. 317.

When equity will interpose to relieve a defendant from a judgment he has allowed to be taken against him at law: *O. R. & N. Co. v. Gates*, 10 Or. 514.

Proceeding supplemental to execution, being at law, cannot embrace right to foreclose: *Knowles v. Herbert*, 11 Or. 54.

Distinctions between actions at law and suits in equity has not been abolished by Code in Oregon: *Burrage v. B. G. & Q. M. Co.*, 12 Or. 169.

Where the right is cognizable and enforceable in a court of law, resort must be had there rather than in equity: *Phipps v. Kelly*, 12 Or. 213.

But when equity originally had jurisdiction of a class of cases, its jurisdiction is not lost by statute affording a legal remedy in such cases: *Id.*

The act of 1878 (sec. 2874, *Hill's A. L.*), providing for enforcing a liability against a wife for family expenses, does not oust the original jurisdiction of equity over married women's rights of property: *Id.*

Court cannot determine questions of principal and surety between defendants jointly liable in a foreclosure suit, where not necessary to the foreclosure: *Hovenden v. Knott*, 12 Or. 267.

When creditor's bill may be filed to restrain or set aside fraudulent assignment and misapplication of funds of assignor for benefit of creditors: *Dawson v. Coffey*, 12 Or. 513.

Mistake in a deed must be relieved in equity, and cannot be shown by parol as a defense in ejectment when such



**Equity (continued).**

proof varies the terms of the deed: *Holcomb v. Mooney*, 13 Or. 503.

Bills of review are abolished by the Code, but the same remedy exists, and a suit to set aside a decree can be maintained on the same grounds which formerly would have supported such bill: *Crews v. Richards*, 14 Or. 442. But such suit cannot be maintained where the grounds relied upon were known and could have been used in the former suit: *Id.*

Attachment affords sufficient lien to enable equity to take jurisdiction to set aside a fraudulent conveyance: *Dawson v. Sims*, 14 Or. 561.

Equity will interfere for the protection of a person of weak mind who has by undue influence been induced to enter into an inequitable contract: *Ward v. Buckley*, 1 W. T. 279.

Act of the legislative assembly destroying distinctions between law and equity, and prescribing a single form of action to establish and enforce private rights, is in violation of the Organic Act, and void: *Stevens v. Baker*, 1 W. T. 315.

In the absence of a local equity system, the equity rules of the United States Supreme Court are binding on the territorial courts in chancery cases: *Id.*

Issuance of patent is such a final decision of the executive department of the government respecting public lands as will give the courts jurisdiction, at suit of person seeking to set the patent aside: *Shockley v. Brown*, 1 W. T. 463.

The distinctions between actions at law and suits in equity, in matters of procedure, under the several codes successively adopted in Washington Territory: *Garrison v. Cheeney*, 1 W. T. 489.

City, in prosecuting a suit to abate nuisance, acts for the public, and is entitled to proceed in equity in the first instance: *Moore v. Walla Walla*, 2 W. T. 184.

Failure of defendants to demand jury trial waives their right to object that plaintiff had a remedy at law: *Id.*

Proceedings supplemental to execution, though attached to law case, are of equitable cognizance: *Murne v. Schwabacher Bros. & Co.*, 2 W. T. 191.

**Equity (continued).**

Court of equity will grant no relief to a party claiming under a sham decree: *Connolly v. Cunningham*, 2 W. T. 242.

A suit in equity may be maintained against a person collecting money from a debtor without authority, if it be shown the debtor is insolvent: *McCoy v. Ayers*, 2 W. T. 307.

Court of equity cannot review a finding of fact by a competent tribunal, unless the finding is impeached for fraud or mistake: *Sparks v. Brown*, 2 W. T. 426.

So in the absence of fraud or mistake, a court of equity will not review decision of secretary of interior upon a question of mixed law and fact: *Id.*

Even when an equitable defense is made in action at law, jurisdiction is determined by presuming everything of common-law cognizance, until the necessity of equity jurisdiction appears: *Id.*

**2. PLEADING.**

Misjoinder and multifariousness are grounds for demurrer: *White v. Delschneider*, 1 Or. 254.

If matter excepted to for impertinence be responsive to bill, exception not allowed: *Lownsdale v. Portland*, 1 Or. 381.

Equitable defense could be pleaded in action at law under section 93 of Code as amended: *Delay v. Chapman*, 2 Or. 242.

Essential to equitable defense that there be no legal defense: *White v. Allen*, 3 Or. 103.

Material facts that did not exist at the commencement of suit may be set up by supplementary answer: *Id.*

When answer sets up complete legal defense, cross-bill in equity under section 377 of the Civil Code (sec. 381, Hill's A. L.), cannot be filed: *Dolph v. Barney*, 5 Or. 191; *Scheland v. Erpelding*, 6 Or. 258.

Facts forming but a partial defense to the action, requiring interposition of equity, if defendant has no remedy at law, may be set up by cross-bill: *Hatcher v. Briggs*, 6 Or. 31.

Failure to plead equitable defense by cross-bill does not prevent defendant from suing thereon as an original bill: *Hill v. Cooper*, 6 Or. 181.

**Equity (continued).**

Defendant in divorce suit may file cross-bill, and demand and receive affirmative relief: *Dodd v. Dodd*, 14 Or. 338.

Bills for review are original suits under Code, and defense is made by answer: *White v. Allen*, 3 Or. 103.

**3. PRACTICE.**

Voluntary appearance of defendant does not waive time to plead, but defects of service and informalities in the process only: *Harker v. Fahie*, 2 Or. 89.

Amendment of Code allowing equitable defenses in actions at law is valid, and a radical change: *Delay v. Chapman*, 2 Or. 242.

Issues of fraud and mismanagement of directors of corporation submitted to a jury: *Hedges v. Paquett*, 3 Or. 77.

Defective decree may be reformed under a prayer for general relief: *White v. Allen*, 3 Or. 103.

An answer in equity case which denies plaintiff's whole cause of suit, and sets up a counterclaim, is not such a pleading of counterclaim as to prevent nonsuit: *Dove v. Hayden*, 5 Or. 500.

Question of fact may be submitted to a jury, and their verdict read in evidence at the trial: *Swegle v. Wells*, 7 Or. 222.

The general equity practice must be looked to to determine when a jury is proper: *Id.*

If the facts are strongly controverted and the evidence nearly equally balanced, or if the difficulty upon the facts is too great to be removed by a master, an issue may be tried by jury: *Id.*

The verdict is not conclusive on appeal, but will not be disregarded unless clearly contrary to the evidence: *De Lashmutt v. Everson*, 7 Or. 212; *Swegle v. Wells*, 7 Or. 222.

On proper showing, relief may be granted, whether prayed for or not: *Gilmore v. Gilmore*, 7 Or. 374.

Evidence of collusion cannot be received after an order allowing interpleader is made: *Fahie v. Lindsay*, 8 Or. 474.

Practice in foreclosure suit where several defendants, claiming inconsistent rights, answer each other: *Ladd and Tilton v. Mason*, 10 Or. 308.

**Equity (continued).**

Amendment of 1885 (sec. 397, Hill's A. L.), regarding manner of taking testimony and appeals in equity cases, applies only to ordinary suits, not to collateral and special proceedings: *Martin v. Martin*, 14 Or. 165.

Effect of said amendment of 1885, respecting trial of equity cases, is to repeal the sections of the Code providing for taking depositions after issue joined, and also provisions authorizing employment of short-hand reporter: *Marks & Co. v. Crow*, 14 Or. 382.

And it seems that such amendment prevents taking depositions *de bene esse*, excepting where reference has been had to find the facts, or to find the facts and law: *Id.*

Where statute regulating proceedings in a suit is enacted, altering the mode of procedure, it will not affect proceedings already had in pending cases: *Id.*

So depositions taken before such amendment took effect may be considered after the sections providing for taking depositions are repealed: *Id.*

Equity practice and procedure, and distinctions between suits in equity and actions at law, under the several codes, successively adopted in Washington Territory: *Garrison v. Cheeney*, 1 W. T. 489.

**Erasures.** See Alteration of Instruments.

In judgment, court will not presume prejudicial to accused in criminal case: *Jennings v. State*, 1 Or. 290.

In written instrument may be explained by parol, and such evidence does not contradict the writing: *Wren v. Fargo*, 2 Or. 19.

In record, where record is used to contradict certified copy, must be fully explained: *Dolph v. Barney*, 5 Or. 192.

It should be proved that the certified copy was not a true copy when made: *Id.*

**Error.** See Appeal and Error.

**Estates of Decedents.** See Administration; Administrators and Executors; Heirs; Legacies; Wills.

**Estoppel.**

Recital in a deed of the existence of a mortgage estops grantee from denying the same: *Holmes v. Ferguson*, 1 Or. 220.

Parties and privies are bound by recitals of deed through which they claim title: *Id.*



**Estoppel (continued).**

- Parties are bound by recitals in their deed; and this applies to married women: *Graham v. Meek*, 1 Or. 325.
- A decree cannot be pleaded as an estoppel against one not a party or a privy: *Lownsdale v. Portland*, 1 Or. 381.
- Dedication or release without covenants, by mere occupant of public land in Oregon, prior to 1850, does not bind: *Lownsdale v. Portland*, 1 Or. 397.
- City estopped by adopting a map as official, which does not show the disputed strip as public property: *Id.*
- Wife not estopped to claim her land because of silence during suit against husband to foreclose his mortgage thereon, in which suit she is not made a party: *Fahie v. Pressey*, 2 Or. 23.
- Quitclaim deed does not estop grantee from showing his grantor had no estate to which dower attached: *Farnum v. Loomis*, 2 Or. 29.
- Party otherwise estopped may avail himself of the truth, when same fact is shown by adversary's pleadings: *Lee v. Summers*, 2 Or. 260.
- One cannot dispute a title which he sets up, and upon which he bases all his rights: *Eagle Woolen Mills Co. v. Monteith*, 2 Or. 277.
- Making or agreeing to make quitclaim deed of the grantor's title, derived from a certain source, does not estop maker from buying, subsequently, an outstanding title, and holding same land: *Shively v. Welch*, 2 Or. 288.
- Grantor seeking to show his own deed voidable has no standing while retaining purchase-money: *Kelly v. People's Trans. Co.*, 3 Or. 189.
- Recital of due service of summons in decree does not estop when return shows the mode of service, and the same is insufficient: *Heatherly v. Hadley and Owen*, 4 Or. 1.
- A recital in a decree that "notice has been given in due form of law," will not preclude a party from denying the jurisdiction of the court in a suit brought to reform the decree: *Id.*
- If seisin or possession of a particular estate is affirmed in a deed, expressly or by implication, the grantor is estopped to deny: *Taggart v. Risley*, 4 Or. 235.
- Estoppel by deed; nature and extent of the rule: *Id.*; *Bayley v. McCoy*, 8 Or. 259.

**Estoppel (continued).**

Stockholder present and assenting to by-law adopted at stockholders' meeting is estopped from questioning the legality of assessments on the stock made by such by-law: *Willamette Freighting Co. v. Stannus*, 4 Or. 261.

In ejectment, where both parties claim title from same source, neither can impugn it: *Dolph v. Barney*, 5 Or. 191.

Minor arriving at age, and receiving proceeds of guardian's sale on partition, is estopped to deny the validity of the sale, and is presumed to ratify the same: *Braze v. Schofield*, 2 W. T. 209.

A party who has deliberately, by his declaration, induced a party to believe a particular thing true, cannot, in subsequent litigation, falsify it, under section 765, subdivision 4, of the Code (sec. 775, Hill's A. L.): *Collins v. Delashmutt*, 6 Or. 54.

Estoppel must be pleaded to be taken advantage of: *Rugh v. Ottenheimer*, 6 Or. 231; *Remillard v. Prescott*, 8 Or. 37.

Grantor and his privies are estopped to deny title to which they have given general warranty: *Wilson v. McEwan*, 7 Or. 87.

Holder of negotiable paper purchased with notice of equities cannot urge as estoppel against maker, who had no knowledge of the fraud at the time, the latter before the purchase told him he had no objection to his buying the note from the payee: *De Lashmutt v. Everson*, 7 Or. 212.

Sufficient negligence shown in this case, in executing quit-claim deed, to estop grantor from asserting after-acquired title: *Dorris v. Smith*, 7 Or. 267.

Mortgagor in possession cannot claim his possession unlawful, when sued for rents and profits: *Renshaw v. Taylor*, 7 Or. 315.

Party is not precluded from asserting his title by his acts in causing a street improvement affecting the property to be paid by the other party, where the acts are not relied on by the latter in making such payments: *Parker v. Taylor*, 7 Or. 435.

Acceptance by wife of money paid by husband in lieu of her equitable interest in his land, pursuant to decree

**Estoppel (continued).**

granting her divorce, estops her from making further claim to the land: *Brooks v. Ankeny*, 7 Or. 461.

The rule that a tenant cannot dispute his landlord's title binds the successors of the first tenant: *Jones v. Dove*, 7 Or. 467.

All stockholders, and the corporation, are chargeable with notice of the conditions of subscriptions to stock, and there is no estoppel between them: *Coyote G. & S. M. Co. v. Ruble*, 8 Or. 284.

Mere silence works no estoppel, unless it becomes fraud: *Hugell v. Kinney*, 9 Or. 250.

Knowledge of the publication of an offer of reward over defendants' signature, unauthorized by them, does not estop them by their mere silence: *Id.*

Quitclaim of dower by wife in husband's deed does not operate to estop her from claiming an existing or after-acquired fee-simple interest: *Burston v. Jackson*, 9 Or. 275.

Mere expressions of opinion of location of boundary, made by former owner without fraud, do not estop: *Goddard v. Parker*, 10 Or. 102.

No estoppel arises by allowing a person to erect improvements where he is given notice promptly: *Id.*

The burden is on the one asserting estoppel as a defense to prove that the land was purchased with reference to and in reliance on a certain map as claimed, showing boundaries different from those set up: *Id.*

Party accepting itemized account demanded, and not objecting until trial, to the form of verification, is estopped: *Robbins v. Benson*, 11 Or. 514.

Judgment by default operates by way of estoppel, as if there had been a verdict for plaintiff: *Neil v. Tolman*, 12 Or. 289.

Abutting lot-owner, encouraging by acts indicating consent, the improvement of a street by a city, is estopped thereafter to question the legality of the improvement: *Hawthorne v. East Portland*, 13 Or. 271.

Plea of estoppel neither admits nor denies the facts alleged in the complaint, but denies plaintiff's right to allege them: *Page & Co. v. Smith*, 13 Or. 410.

To work estoppel, the party must have deliberately and

**Estoppel (continued).**

intentionally misled another to believe a thing true and to act upon it: *Id.*

Lot-owner having granted the right of building a wharf in front of his lot on tide-water, his subsequent grantee of the lot is estopped by his deed from objecting to its maintenance: *McCann v. Oregon R'y etc. Co.*, 13 Or. 455.

City cannot take advantage of not having approved or disapproved of the work done under contract, as is provided by the contract to be done before payment is to be made, when six months have elapsed before suit, to avoid payment of a just claim: *N. P. L. & M. Co. v. East Portland*, 14 Or. 3.

University corporation, having availed itself of the services of a military instructor, cannot defend, in an action for compensation, on the ground that it never passed an ordinance employing him: *Tyler v. T. of T. A. & P. U.*, 14 Or. 485.

Establishment, by a party, of surveys and boundaries to his lands, estops him from resisting a tax for want of identification of the property, founded on such description: *Puget Sound Agricultural Co. v. Pierce County*, 1 W. T. 159.

Owners of lots abutting alley, who petitioned city trustees to vacate alley and replat adjoining block, are estopped from questioning rights so acquired: *Burmeister v. Howard*, 1 W. T. 207.

Defendant in criminal case and his counsel, having consented to separation of the jury, should be estopped from objecting thereto on appeal: *Hartigan v. Territory*, 1 W. T. 447.

By accepting the fruits of a decree, party is estopped from appealing therefrom: *Lyons v. Bain*, 1 W. T. 482.

Plaintiff in action to recover possession of real property is not estopped by his silence or conduct, when thereby he neither induced the defendant to go into or remain in possession: *Bullene v. Garrison*, 1 W. T. 587.

Grantee of city lot, by deed referring to recorded plat, is estopped from denying existence of abutting street shown on such plat, and he cannot set up title to such street acquired before platting, or claim by adverse possession: *Moore v. Walla Walla*, 2 W. T. 184.



**Estoppel (continued).**

Claimant under patent, issued to widow and heirs of deceased donation claimant, is conclusively estopped from denying that the widow and heirs acquired title under that act: 2 W. T. 209.

What is necessary to create account stated by way of estoppel: *Baxter v. Waite*, 2 W. T. 228.

**Estrays.**

Definition; animal on the range where raised is not an estray: *Shepherd v. Hawley*, 4 Or. 206.

Animal must be breachy or vicious to be taken up in August or September as an estray: *Id.*

**Evidence.** See Adverse Possession; Agency; Boundaries; Corporations; Criminal Law; Dedication; Deeds; Depositions; Ejectment; Fraud; Fraudulent Conveyances; Homicide; Insanity; Partnership; Payment; Pleading; Practice; Seduction; Suretyship; Trusts; Variance; Witnesses.

1. JUDICIAL NOTICE.

2. PRESUMPTIONS.

3. BURDEN OF PROOF.

4. BEST EVIDENCE.

5. RECORDS AS EVIDENCE.

6. DOCUMENTARY EVIDENCE.

7. BOOKS KEPT IN THE COURSE OF BUSINESS.

8. PAROL EVIDENCE.

9. OPINION EVIDENCE.

10. CHARACTER EVIDENCE.

11. RES GESTÆ.

12. DECLARATIONS AND ADMISSIONS.

13. DYING DECLARATIONS.

14. CONFESSIONS.

15. RÉPUTE.

16. PERPETUATION OF EVIDENCE.

17. GENERALLY AND RELEVANCY.

**1. JUDICIAL NOTICE.**

Where officer taking affidavit omitted venue therein, but resided in the district of the court, his authority recognized: *Dennison v. Story*, 1 Or. 272.

Courts take notice of laws by which school superintendents sell school lands to individuals: *Dolph v. Barney*, 5 Or. 192.

**Evidence (continued).**

Courts do not take judicial knowledge of the laws of foreign countries; they must be proved as facts: *State v. Moy Looke*, 7 Or. 54.

Nor of a local custom to appropriate water flowing in streams: *Lewis v. McClure*, 8 Or. 273.

Court takes judicial notice of navigability of streams, and also legal subdivision of public lands and government surveys: *Shaw v. Oswego Iron Co.*, 10 Or. 371.

The court takes notice that the Tualatin River is not a navigable stream, and that the United States has surveyed and sold the bed of that river by the acre as though it was dry land: *Id.*

That a general war between Indian tribes was waging at a certain time: *Yelm Jim v. Territory*, 1 W. T. 63.

That the city of Seattle, mentioned in the venue of an indictment, is in King County: *Schilling v. Territory*, 2 W. T. 283.

**2. PRESUMPTIONS.**

Where officer is known, court presumes he acted within his jurisdiction: *Dennison v. Story*, 1 Or. 272.

Where paper among the records of the case was indorsed "F. S. Holland," it is presumed F. S. Holland is the clerk of the court: *Carothers v. Wheeler*, 1 Or. 196.

Dedication of land to public uses is not presumed against the owner, but must be clearly proved: *Lownsdale v. Portland*, 1 Or. 397.

Where return showed service in Douglas County, and was signed "sheriff," it was presumed that the person so signing was sheriff of that county: *Carland v. Heineborg*, 2 Or. 75.

Note in possession of makers presumed paid; disputable presumption: *Hedges v. Strong*, 3 Or. 18.

The voluntary or intentional use of weapon calculated to take life raises presumption of malice: *State v. Bertrand*, 3 Or. 61.

That the consideration expressed in a deed is the true price may be rebutted: *Stark v. Olney*, 3 Or. 88.

Every intendment in favor of judgment of court of competent jurisdiction: *GrosLouis v. Northcut*, 3 Or. 394; *Fulton v. Earhart*, 4 Or. 61; *Tustin v. Gaunt*, 4 Or. 305.

**Evidence (continued).**

After general verdict for plaintiff, every material allegation in complaint is presumed found true: *Torrence v. Strong*, 4 Or. 39.

Judgment creditor presumed to have lost his debt, when sheriff has failed to levy or make return: *Moore v. Floyd*, 4 Or. 101.

State treasurer is presumed to know what appropriations have been made: *Brown v. Fleischner*, 4 Or. 132.

It is presumed that every written contract contains all its terms; mistake is not presumed: *Evarts v. Steger*, 5 Or. 147.

That officer is regularly appointed, and that his duty is regularly performed: *Dolph v. Barney*, 5 Or. 192.

Though the presumption of innocence is preferred rather than the presumption of life when the two conflict, the question should be determined by the jury, where the legality of a marriage was in issue, from all the evidence: *Murray v. Murray*, 6 Or. 17.

On application for leave to issue execution on dormant judgment, same presumption in favor of the judgment exists as on collateral attack: *Strong v. Barnhart*, 6 Or. 93.

Presumed that service was made in the county of the officer making the return: *Roy v. Horsley*, 6 Or. 270.

That the attorney served was a resident of the county where he was served and practicing: *Id.*

When a transaction is capable of construction consistent with good faith, fraud is not presumed: *Hurford v. Harned*, 6 Or. 362.

Probate court of the territory was of limited and inferior jurisdiction, and no presumption exists in favor of its judgments: *Farley v. Parker*, 6 Or. 105.

The presumption in favor of the regularity of the proceedings, provided by charter of Portland, in improving streets, applies only after jurisdiction is obtained: *Van Sant v. Portland*, 6 Or. 395; *N. P. T. Co. v. Portland*, 14 Or. 24.

Retention of chattels by vendor after sale creates a disputable presumption of fraud as against creditors: *McCully v. Swackhamer*, 6 Or. 438.

On proof of due execution of will, it is presumed to ex-

**Evidence (continued).**

- press testator's unrestrained and uninfluenced intention: *Greenwood v. Cline*, 7 Or. 17.
- Giving of promissory note is *prima facie* evidence of accounting and settlement: *Matasce v. Hughes*, 7 Or. 39.
- The presumption that a person not in possession of a note has no authority to receive payment may be rebutted: *Swegle v. Wells*, 7 Or. 222.
- Verdict is presumed as broad as the issues to be passed upon: *Reed v. Gentry*, 7 Or. 497.
- The presumption is, that assignment, though preferring unsecured creditors, is not fraudulent: *Kruse v. Prindle*, 8 Or. 158.
- That a person entering under color of title enters and occupies to the boundaries expressed in his deed: *Phillippi v. Thompson*, 8 Or. 428.
- In action on a lost official undertaking, that the same was legally and duly executed: *Howe v. Taylor*, 9 Or. 288.
- On appeal, reply is presumed to have been filed, where findings cover all new matter in answer: *Weissman v. Russell*, 10 Or. 73.
- Canceled county orders in the possession of the county treasurer, duly indorsed, are presumed paid: *Portland v. Besser*, 10 Or. 242.
- Bills against a county, in favor of a certain person, in the clerk's office, and for which warrants have duly issued, are presumed to have been presented and filed by such person: *Id.*
- No presumption of guilt from the fact of taking goods, if they were taken believing them lost or abandoned: *State v. Swayze*, 11 Or. 357.
- The only presumption arising from the possession of property recently stolen is one of fact, not of law: *State v. Hale*, 12 Or. 352.
- Statutes of another state are not presumed to be like our own: *Balfour v. Davis*, 14 Or. 47.
- The record showing process to have been served by a coroner, the presumption is that sheriff was laboring under the disabilities that make it incumbent on coroner to act in his stead: *Rodolph v. Mayer*, 1 W. T. 133.
- In capital cases, there is no presumption in favor of the regularity of the proceedings: *Shapoonmash v. United States*, 1 W. T. 188.



**Evidence (continued).**

Presumption of the correctness of an account arises from the rendering of the account, and the absence of objection thereto within reasonable time: *Baxter v. Waite*, 2 W. T. 228.

**3. BURDEN OF PROOF.**

Is on shipper to show value of goods injured by carrier: *Seller v. Steamship Pacific*, 1 Or. 409.

On defendant, to show he contracted as agent, and that plaintiff had notice: *McCall v. Elliott*, 3 Or. 138.

In election contest, party attacking voter who has voted must show his disqualification: *Darragh v. Bird*, 3 Or. 229.

The plaintiff, a contractor, suing city and claiming a certain estimate set forth in his contract was a mistake, has the burden to show that fact: *Northrop v. Portland*, 3 Or. 258.

Selling liquor without license, burden on defendant to show that he is licensed: *State v. Cutting*, 3 Or. 260.

On party attacking record of County Court in probate matters: *Russell v. Lewis*, 3 Or. 380.

On sheriff, to show that plaintiff in execution has not lost his debt, where he has failed to levy or make return: *Moore v. Floyd*, 4 Or. 101.

In action to recover real property, where plaintiff's title is denied, burden on him to show title: *Farley v. Parker and Sutherland*, 4 Or. 269.

In equity case, where the testimony of the plaintiff and defendant is in conflict and unsupported, the plaintiff cannot obtain relief, since there is no preponderance in his favor: *Smith v. Griswold*, 6 Or. 440.

Burden is on the plaintiff, suing on note given as collateral security for the payment of another note, to show that both are due and unpaid: *Moore v. Miller*, 7 Or. 486.

Answer pleading non-performance of an agreement as failure of consideration, and reply denying non-performance, burden is on plaintiff to show performance: *Briscoe v. Jones*, 10 Or. 63.

Burden of a defense of estoppel by matter of record must be sustained by defendant: *Goddard v. Parker*, 10 Or. 102.

Party alleging negligence must sustain the burden of proving it: *Walsh v. Oregon R'y & Nav. Co.*, 10 Or. 252.

**Evidence (continued).**

He must prove that the injury was caused by the negligence of the defendant, and was not due to his own negligence and want of care: *Id.*

Person claiming benefit of written tender assumes the burden of proving his ability to pay at the time: *Ladd and Tilton v. Mason*, 10 Or. 308.

Instruction that burden of proof was on the plaintiff; held, not error where not objected to for its generality, though as to some issues defendant had the burden: *Rogers v. Wallace*, 10 Or. 387.

In criminal cases, the defense of insanity must be proved by the defendant beyond a reasonable doubt: *State v. Murray*, 11 Or. 413.

Burden is on a defendant in ejectment in a contest between legal titles on assailing plaintiff's title for notice and want of consideration: *McIntyre v. Kamm*, 12 Or. 253.

Is on a debtor claiming property as exempt from execution, to prove affirmatively all facts necessary to establish it: *Stewart v. McClung*, 12 Or. 431.

Where a debtor conveys all his property to his brother in payment of an alleged debt due him, in a suit by creditors to set aside the deed the burden is on the grantee to prove a valuable and adequate consideration: *Marks & Co. v. Crow*, 14 Or. 382.

Failure to object within reasonable time to an account rendered raises a presumption of the correctness of the account, and shifts the burden of proof: *Baxter v. Waite*, 2 W. T. 228.

**4. BEST EVIDENCE.**

Voluntary statement by witness of the contents of a writing which is not in evidence is cured if he at same time produce same: *White v. Allen*, 3 Or. 103.

The original and a record copy of an official undertaking being lost or stolen, parol evidence of the contents of the copy may be shown, on proof of the correctness of such copy, though such record is not required by law to be kept: *Howe v. Taylor*, 9 Or. 288.

Existence and contents of a deed being in issue, deed must be produced or non-production accounted for before parol proof of such facts is admissible: *Smith v. Cox*, 9 Or. 327.

**Evidence (continued).**

The rule is the same, though the deed was between third parties, and void for incapacity of grantor: *Id.*

Correctness as well as loss of original memorandum, before secondary evidence of its contents is admissible, must be proved: *T. & McK. v. M. & B.*, 9 Or. 405.

Copy taken without comparison to ascertain its correctness, made by witness from original from which another person read off the items, is admissible when the original cannot be produced: *Id.*

Certified copy of a certified copy is not admissible as evidence: *Goddard v. Parker*, 10 Or. 102.

Oral evidence of the condition and appearance of a hat, when material, is admissible without producing or accounting for absence thereof: *Heneky v. Smith*, 10 Or. 349.

Secondary evidence of the contents of a certified copy of an answer is admissible upon proof of the loss of the original, and of such copy: *Williams v. Gallick*, 11 Or. 337.

On the loss of a writing being proved, a witness knowing its contents may testify in regard thereto: *Williams & Co. v. Miller & Co.*, 1 W. T. 88.

Deed itself is highest evidence of its contents, whether before or since the registration laws, the execution and delivery having been first duly proved: *Skellinger v. Smith*, 1 W. T. 369.

The record of a deed showing it to bear a given date must yield to the deed itself, showing a different date: *Id.*

**5. RECORDS AS EVIDENCE.**

Authentication by judge of record of any state must show affirmatively he is the judge, chief justice, or presiding magistrate: *Pratt v. King*, 1 Or. 49; *contra*, *Keyes v. Mooney*, 13 Or. 179.

The official character of the judge must appear from his own certificate: *Id.*

Manifest clerical error in date in certificate of authentication should be disregarded: *Id.*

Recorded plat is not evidence of the existence of a road, but of its location: *Naylor v. Beeks*, 1 Or. 216.

The express provisions of the statute affecting authentication of deed out of the state must be strictly complied with: *Knighton v. Smith*, 1 Or. 276.

**Evidence (continued).**

Court will not look outside of justice's docket to learn that special constable was not duly appointed: *White v. Thompson*, 3 Or. 115.

Certificate of board of election canvassers is the record of their decision: *Warner v. Myers*, 3 Or. 218.

Mistake in dates; error in record presumed rather than that order of sale of property in probate was made before the return day: *Russell v. Lewis*, 3 Or. 380.

What papers belong to judgment roll in probate; the whole record may be introduced to deny jurisdiction recited in part thereof: *Gilmore v. Taylor*, 5 Or. 89.

County Court speaks only by its journal, and contract with the county can be proved thereby only: *Douglas County Road Co. v. Abraham*, 5 Or. 318.

Foreign judgment regular on its face, introduced as evidence, may be attacked by extrinsic proof of fraud or want of notice: *Murray v. Murray*, 6 Or. 17.

Record is conclusive on the question of former adjudication, where the judgment roll shows the pending suit was included in the issues: *Underwood v. French*, 6 Or. 66.

Contract of the county duly attested can be impeached only by showing it is not genuine, or that its recitals are not true: *Road Co. v. Douglas County*, 6 Or. 299.

Record of a void judicial proceeding is admissible as a private writing to show the inducement to a deed executed, and as part of the *res gestæ*: *Stinson v. Porter*, 12 Or. 444.

Certificate of auditor and clerk of city of Portland has no effect, excepting to authenticate copies of records of which he is custodian: *N. P. T. Co. v. Portland*, 14 Or. 24.

Record of proceedings of city in laying out a street must show the facts as to the qualification of viewers; and the affidavit of the viewers, or the finding of the city council as to their qualification, is insufficient: *Id.*

In an action on a bail bond, the journal of the court, showing default of the principal, is admissible in evidence against the surety: *Clifford v. Marston*, 14 Or. 426.

Record of register of public land-office may be proved by certified copies: *Ward v. Moorey*, 1 W. T. 104.



**Evidence (continued).**

Record of a deed showing it to bear a certain date must yield to the deed itself, showing a different date: *Skellinger v. Smith*, 1 W. T. 369.

Records of county, showing that another county had been called upon to remove from the former county paupers of the latter kept there, does not prove the former's liability, but the contrary: *King County v. Collins and Gordon*, 1 W. T. 469.

Indorsement on a notice of mechanic's lien of time of filing, and in what book recorded, is not evidence of the recording: *Jewett v. Darlington*, 1 W. T. 601.

Existence of a judgment, though not entered in journal, or bearing file mark of clerk, may be established by competent proof after death of judge who rendered it: *Eakin v. McCraith*, 2 W. T. 112.

**6. DOCUMENTARY EVIDENCE.**

Intention of the writer of an instrument offered in evidence is a question for court, unless the writing is a part of a transaction, when the whole evidence is to be submitted to the jury: *Winter and Lattimer v. Norton*, 1 Or. 42.

Certificate under donation land law is evidence of the facts recited therein: *Keith v. Cheeny*, 1 Or. 285.

"Received in good order," in shipping receipt, is a recital, not an agreement, and is *prima facie* evidence of the fact recited: *Seller v. Steamship Pacific*, 1 Or. 409.

Map relied upon to prove dedication must be shown to have been made or assented to by donors: *Leland v. Portland*, 2 Or. 46.

Patent from the United States to lands held under the Donation Act proves the regularity of the preliminary proceedings: *White v. Allen*, 3 Or. 103.

Certificate of board of election canvassers is evidence of their decision: *Warner v. Myers*, 3 Or. 218.

Copy made and certified by referee as a true copy, and returned as an exhibit, will be sufficient in lieu of the original offered in evidence: *Bohlman v. Coffin and Carter*, 4 Or. 313.

To prove leasing, a document not describing the premises is rejected for uncertainty: *Noyes v. Stauff*, 5 Or. 455.

Deed of insane person is void, and may be impeached

**Evidence (continued).**

when offered to prove title in ejectment: *Farley v. Parker*, 6 Or. 105.

A will is not admissible to prove title until it is probated: *Willamette Co. v. Gordon*, 6 Or. 175; *Jones v. Dove*, 6 Or. 188.

Certified copies of copies of original papers in local land-office, retained there under act of Congress after originals are sent to Washington, are properly admissible: *Id.*

Deed void as a conveyance may be admitted for purpose of identifying the land: *Ramsey v. Loomis*, 6 Or. 367.

Original will, after probate, does not have to be offered and proved when used as evidence: *Jones v. Dove*, 6 Or. 188.

Historical works are not admissible to prove the unwritten law of a country: *State v. Moy Looke*, 7 Or. 54.

Will devising the donation claim of Bartholomew Dove may be introduced, to be followed by extrinsic proof that Bethuel Dove was meant: *Jones v. Dove*, 7 Or. 467.

Two writings of same date, same parties, and same subject-matter should be construed together: *Kruse v. Prindle*, 8 Or. 158.

Execution of a lost paper being disputed, and a pretended copy offered in evidence, its genuineness and the fact of execution must be left to the jury: *Rosendorf v. Hirschberg*, 8 Or. 240.

Certified copy of certified copy is not evidence of the original, unless made so by statute: *Goddard v. Parker*, 10 Or. 102.

Several different copies may be attached and certified by one certificate: *Portland v. Besser*, 10 Or. 242.

Canceled county orders, in the possession of the county treasurer, duly indorsed, are presumed to have been regularly paid: *Id.*

Bills against county, in favor of certain person in the clerk's office, and for which warrants have duly issued, are presumed to have been presented and filed by such person: *Id.*

Tax deed, offered with tax records showing its invalidity, though regular on its face, is no evidence of title: *Id.*; *De Lashmutt v. Sellwood*, 10 Or. 319.

**Evidence (continued).**

Documentary evidence, proving plaintiff's case, being admitted, and defendant not introducing evidence contradictory, jury may be instructed to find for plaintiff: *Id.*

Documentary evidence, not offered before referee to take the testimony, may be put in evidence at the hearing: *Baker v. Woodward*, 12 Or. 3.

Printed advertisement of offer of reward by carrier is evidence of admission of liability for loss of money package: *Bennett v. N. P. Ex. Co.*, 12 Or. 49.

Documentary evidence may be admitted provisionally, and instructions as to effect given afterward: *Smith v. Shattuck*, 12 Or. 362.

Tax deed, though defective in description, may, when accompanied by possession, be admitted to prove color of title: *Id.*

Letters forming a contract, ambiguous as to the intention, may be supplemented by parol: *Fisk v. Henarie*, 13 Or. 156.

In action for seduction, letter by daughter to defendant, and the oral reply thereto, are admissible by plaintiff, and stand on the footing of conversations between the parties: *Lee v. Cooley*, 13 Or. 433.

Witness may translate document written in a foreign language, though not sworn as interpreter: *Krewson & Co. v. Purdom*, 13 Or. 563.

In a controversy between successive mortgagees of chattels, the elder mortgage, though not renewed according to law, is admissible, to be followed by proof of the fraudulent character of junior mortgage: *Case T. M. Co. v. Campbell*, 14 Or. 460.

Whether a writing constitutes a contract is a question for the court: *Tolmie v. Dean*, 1 W. T. 46.

Letter, containing an account not objected to within a reasonable time, is evidence of the matters contained in it: *Smith v. Kennedy*, 1 W. T. 55.

So where the genuineness of the answer to the letter is in question, the letter is admissible as a circumstance: *Id.*

Memory of a witness may be refreshed by reference to a bill of particulars in his own handwriting: *Williams & Co. v. Miller & Co.*, 1 W. T. 88.

Memorandum of receiving agent of a ship, signed and

**Evidence (continued).**

showing the receipt of the goods for shipment and delivery, will be considered a bill of lading: *Williams v. Steamship Columbia*, 1 W. T. 95.

Map offered by prisoner for purpose of illustrating the situation, loaded with explanatory matter in the nature of hearsay, is properly excluded: *Leonard v. Territory*, 2 W. T. 381.

**7. BOOKS KEPT IN COURSE OF BUSINESS, ETC.**

Account-books, admissibility not decided generally, but error if any was waived by appellant: *Henderson v. Morris*, 5 Or. 24.

Account-books to which both partners had access are *prima facie* correct on an accounting between them: *Boire v. McGinn*, 8 Or. 466.

Bank-books entered after bank hours from tags and checks made during the day are books of original entry: *Ladd and Bush v. Sears*, 9 Or. 244.

Ambiguous entries may be explained by parol, but not shown to mean something different from the import of the language: *Strong v. Kamm*, 13 Or. 172.

Pleadings alleging a contract by which certain accounts should be transferred on the partnership books to the account of one partner, the books are proper evidence of the performance of such contract: *Moore v. Knott*, 14 Or. 35.

**8. PAROL EVIDENCE.**

Contemporaneous parol evidence inadmissible to contradict or vary written instrument: *Hoxie v. Hodges*, 1 Or. 251.

A contract in writing to convey land may be abandoned by parol: *Guthrie v. Thompson*, 1 Or. 353.

In case of patent ambiguity, evidence is admissible only to fix meaning of words, the import of which is not apparent to the court: *Brauns v. Stearns*, 1 Or. 367.

Admissible to explain erasure of written instrument by party offering: *Wren v. Fargo*, 2 Or. 19.

When parties put their contract in writing, no other evidence of the contract admissible: *Lee v. Summers*, 2 Or. 260.

Actual consideration different from that expressed in deed provable by parol: *Brown v. Cahalin*, 3 Or. 45.



**Evidence (continued).**

Item omitted by mistake from receipt on settlement, mistake may be shown: *Williams v. Poppleton*, 3 Or. 139. But if the item was thought of at the time, receipt in full is conclusive: *Id.*

Surrounding circumstances admissible to show general receipt does not include particular item: *Id.*

Parol evidence not admissible to show that the acknowledgment of a married woman was taken separate and apart from her husband, when the certificate of acknowledgment does not show the fact: *Harty v. Ladd*, 3 Or. 353.

Nor to impeach acknowledgment regular on its face, unless allegations of pleadings warrant it: *Dolph v. Barney*, 5 Or. 192; *Moore v. Fuller*, 6 Or. 272.

Paper purporting to be a lease, but not describing premises, is fatally defective, and the ambiguity is patent and cannot be aided by parol evidence: *Noyes v. Stauff*, 5 Or. 455.

Not admissible to show that the judgment roll introduced to prove former adjudication contains issues that were not passed upon by the jury: *Underwood v. French*, 6 Or. 66; *Barrett v. Failing*, 8 Or. 152.

Admissible to prove partnership relating in part to land: *Knott v. Knott*, 6 Or. 142.

Parol evidence is admissible to identify person or thing described in a will: *Jones v. Dove*, 6 Or. 188; *S. C.*, 7 Or. 467; *Moreland v. Brady*, 8 Or. 303.

Admissible to prove that a bill of sale was intended as a chattel mortgage: *Bartel v. Lope*, 6 Or. 321.

Admissible to prove a deed absolute on its face a mortgage: *Hurford v. Harned*, 6 Or. 362; *Stephens v. Allen*, 11 Or. 188; *Albany and Santiam W. D. Co. v. Crawford*, 11 Or. 243.

Admissible to show the number of buildings and inhabitants in a place, to prove the existence of a town, within the statute prohibiting toll-gates near towns: *Milarkey v. Foster*, 6 Or. 379.

Admissible to connect the writing with the subject-matter of the agreement referred to therein, when the instrument does not fully express the same with sufficient clearness: *Hannah v. Shirley*, 7 Or. 115.

**Evidence (continued).**

Not admissible when the plea of former adjudication is interposed to show that certain of the issues covered by a judgment in a former case were withdrawn, and not litigated: *Barrett v. Failing*, 8 Or. 152.

Parol proof of a resulting trust in land is admissible, but not of an agreement to sell the interest of the *cestui que trust*: *Chenoweth and Johnson v. Lewis*, 9 Or. 150.

Rule inhibiting parol evidence to vary a writing applies especially to negotiable paper: *Smith v. Caro and Baum*, 9 Or. 278.

Indorsement in blank cannot be explained or limited by parol: *Id.*

In suit on bond of county clerk, where the original and the recorded copy are lost, parol proof of the contents, the copy, and of the names of the sureties thereon, admissible: *Howe v. Taylor*, 9 Or. 288.

Parol evidence is admissible to locate stake as the starting point in the description of a deed otherwise definite: *Boehreinger v. Creighton*, 10 Or. 42.

Subsequent parol contract on same subject as written agreement between the parties may be proved: *Oregonian R'y Co. v. Wright*, 10 Or. 162.

The appearance and condition of physical objects may be proved by parol, without producing the objects themselves, or accounting for their absence: *Hencky v. Smith*, 10 Or. 349.

Equity permits parol proof contradicting a writing in case of mistake, as in fraud: *Smith v. Butler*, 11 Or. 46.

Admissible to show that a writing, purporting to be an agreement, was in fact a mere form intended for an ulterior purpose: *Branson v. Oregonian R'y Co.*, 11 Or. 161.

Parol evidence admitted to show a deed absolute on its face a mortgage is not to vary its terms, but to establish an equity superior thereto: *Stephens v. Allen*, 11 Or. 188.

Service of notice to quit, by landlord on tenant, may be proved by parol: *Chung Yow v. Hop Chong*, 11 Or. 220.

Delivery of written contract not under seal may be shown to have been conditional by parol: *Simpson v. Carson*, 11 Or. 361.

**Evidence (continued).**

Between the original parties to a note, *semble*, that where on its face it is uncertain, parol proof of whether principal or agent was intended to be bound is admissible: *Guthrie v. Imbrie*, 12 Or. 182.

In crim. con. cases, marriage may be proved by eye-witnesses, or by the parties: *Jacobsen v. Siddal*, 12 Or. 280.

Where letters have passed between the parties concerning a sale of lands, parol proof of the previous understanding in relation to the subject-matter is admissible, where the language of the letters leaves the intention in doubt: *Fisk v. Henarie*, 13 Or. 157.

Parol proof of the previous understanding of the parties in relation to a contract for sale of land, admissible, to be followed by proof of a written recognition of the contract, contained in letters: *Id.*

Ambiguous entry in book of accounts may be explained by parol, but cannot be shown to mean something which its language does not import: *Strong v. Kamm*, 13 Or. 172.

In ejectment, where the description of the land conveyed by a deed is clear and unambiguous, resort cannot be had to parol proof to show an intent to convey a different tract: *Holcomb v. Mooney*, 13 Or. 503.

What is a latent ambiguity, and how far parol evidence is admissible to show what is meant by the description in a deed plain on its face: *Id.*

Parol evidence is not admissible to show that an expressed condition in a bill of sale was intended as a covenant, in the absence of ambiguity in the instrument: *Hale v. Finch*, 1 W. T. 566.

Is properly admissible to show the circumstances under which an incomplete memorandum of sale was signed, and in what capacity the person signed it: *Brewster v. Baxter*, 2 W. T. 135.

Whether a parol contract can be set up to show that a note secured by mortgage, absolute on its face, was conditional, to be void on failure of payee to execute a deed, *quære*: *Kenworthy v. Merritt*, 2 W. T. 155.

**9. OPINION EVIDENCE.**

Not admissible except on questions of skill or science,

**Evidence (continued).**

where witness has no personal knowledge of the facts: *Zachary v. Swanger*, 1 Or. 92.

Where witness states his understanding of a conversation, if it appear by his other evidence that his opinion is correct, the judgment will not be reversed, though the admission of such evidence is erroneous: *Aiken and Flavel v. Leonard and Green*, 1 Or. 224.

Surgeons as experts in action for damages for maltreatment: *Heath v. Glisan*, 3 Or. 64; *Boydston v. Giltner*, 3 Or. 118.

Opinion of witness as to what water power would be appurtenant to a tract of land, upon which he is called upon to value as an expert, is not admissible: *Willamette Falls C. & L. Co. v. Kelly*, 3 Or. 99.

A witness may testify to skill used in the particular operation in an action for damages for malpractice, but not generally as to skill of defendant: *Boydston v. Giltner*, 3 Or. 118; *Williams v. Poppleton*, 3 Or. 139.

Witness may testify as to the meaning of technical words in a pleading, but not to the construction of the pleading: *Williams v. Poppleton*, 3 Or. 139.

Opinion of medical experts as to cause of death; forms of questions depend on circumstances, and discretionary with the trial court: *State v. Glass*, 5 Or. 73. .

Opinion of witness as to whom common repute ascribes ownership is not admissible: *Wilson v. Maddock*, 5 Or. 480.

Opinion of intimate acquaintance to prove insanity admissible, although witness does not state in express words that he is an intimate acquaintance: *Farley v. Parker*, 6 Or. 105.

In accounting between partners, where the books do not show the true state of the business, experts cannot testify as to what the profits ought to or might have been: *Boire v. McGinn*, 8 Or. 466.

Hypothetical questions to expert witnesses must be based on the facts proved: *State v. Anderson*, 10 Or. 448.

Experts cannot testify upon matters within the ordinary scope of observation: *Id.*

The mere opinion of a non-expert, without the facts upon which it is based, or the opinion of an expert without



**Evidence (continued).**

proof of his opportunities for making the same, is inadmissible: *State v. Abrams*, 11 Or. 169.

Experiments to furnish *data* for certain inferences must be based on circumstances like those developed in the case on trial: *State v. Justus*, 11 Or. 178.

Experiments made by firing a gun near pasteboards to show powder-burns thereon, to show that deceased was killed by a near gunshot wound, are inadmissible: *Id.*

Whether a shot was fired near or at a distance, when not directly proved, must be proved by medical experts from an examination of the wound: *Id.*

Experiments by non-professional witnesses, not approved as evidence: *Id.*

Mode of examining intimate acquaintance as to insanity of defendant in a criminal case: *State v. Murray*, 11 Or. 413.

Opinion of a witness, as to whether or not a piece of land is included in a tract described in a United States patent, is inadmissible: *Johnson v. Knott*, 13 Or. 308.

**10. CHARACTER EVIDENCE.**

Defendant in an action for damages for surgical malpractice cannot prove his reputation for skill as a surgeon: *Williams v. Poppleton*, 3 Or. 139.

In criminal case, defendant may prove good character, and state cannot show particular acts in rebuttal: *State v. Garrand*, 5 Or. 156.

Admissible whenever character of witness has been impeached in any of the statutory methods: *Glaze v. Whitley*, 5 Or. 164; *contra*, *Sheppard v. Yocum and De Lashmutt*, 10 Or. 402.

Where witness has been impeached by inconsistent statements made by him, character evidence in his behalf is admissible in rebuttal: *Id.*

Evidence of good character introduced by prisoner should be submitted to the jury, with the other facts and circumstances of the case: *State v. Garrand*, 5 Or. 216.

Party witness for herself cannot be impeached by showing particular acts of immoral conduct: *Leverich v. Frank*, 6 Or. 212.

Her letter to a third person cannot be introduced, containing language indicating she was unchaste: *Id.*

**Evidence (continued).**

Particular facts called out on cross-examination of impeaching witness, tending to show that the latter is not worthy of belief, may be considered by the jury on the question of the credibility of impeached witness: *Steeple v. Newton*, 7 Or. 110.

Good character of plaintiff's and defendant's families may be shown by plaintiff in an action for seduction: *Parker v. Monteith*, 7 Or. 277.

Proper mode of impeaching by inquiring into general reputation: *Page v. Finley*, 8 Or. 45; *State v. Clark*, 9 Or. 466.

The question must be directed to the general reputation of the witness, and omitting the word "general" is fatal: *Id.*

Defendant in action for money had and received, charged with fraud, cannot prove his good character: *Ladd and Bush v. Sears*, 9 Or. 244.

General habits of sobriety cannot be proved to overcome proof of intoxication at time certain: *Heneky v. Smith*, 10 Or. 349.

In malicious prosecution case, founded on an arrest of the plaintiff for larceny, evidence of bad reputation of the plaintiff for honesty and integrity may be proved in defense to rebut proof of want of probable cause, and in mitigation of damages: *Gee v. Culver*, 13 Or. 598.

# 11. RES GESTÆ.

Dying declarations, and those which are part of *res gestæ*, are the only declarations admissible: *Goodall v. State*, 1 Or. 333.

Consultation at time of alleged improper surgical treatment admissible as part of the *res gestæ*: *Williams v. Poppleton*, 3 Or. 139.

Declarations as *res gestæ* must have been made at the time: *State v. Glass*, 5 Or. 73.

To be contemporaneous, the declarations are not required to be precisely concurrent in time with the main fact: *State v. Garrand*, 5 Or. 216.

The fact that complaint by prosecutrix in rape case was made immediately after the commission is admissible to corroborate her testimony, but the particulars of her statement cannot be given: *State v. Tom*, 8 Or. 177.

**Evidence (continued).**

The declaration of a party in his favor, in civil or criminal cases, is admissible only as part of the *res gestæ*: State v. Anderson, 10 Or. 448.

Narrations of the occurrence immediately after injuries are received by ejection from a railroad train, the defendant not being then present, are not part of the *res gestæ*: Sullivan v. Oregon R'y & N. Co., 12 Or. 392.

Record of a void judicial proceeding may be admissible as a private writing as part of the *res gestæ*, and to show the inducement to the execution of a deed: Stinson v. Porter, 12 Or. 444.

Insanity as a defense must be proven to the satisfaction of the jury by the defendant, upon whom the burden lies, except where the facts upon which it is based are part of the *res gestæ*: McAllister v. Territory, 1 W. T. 360.

**12. DECLARATIONS AND ADMISSIONS.**

Evidence of inconsistent declarations is admissible to impeach witness, but is not evidence of the facts stated therein: State v. Fitzhugh, 2 Or. 227.

Assessment roll or written statement furnished assessor is not admissible to prove the value of land sought to be condemned, or to show as an admission the value claimed by owner: Oregon Cascade R. R. Co. v. Baily, 3 Or. 164.

Declarations of deceased, made to her physicians, are competent against the defendant in a case of manslaughter by attempted abortion, to prove the fact of pregnancy: State v. Glass, 5 Or. 73.

In action upon contract for support, admissions in affidavit, made subsequent to the breach, and used in another forum, may be shown as evidence: Tippin v. Ward, 5 Or. 450.

Declarations of ownership by one in actual possession of personalty are admissible after his decease to prove his title: Bartel v. Lope, 6 Or. 321.

Method of impeaching by proof of inconsistent statements: State v. McDonald, 8 Or. 113; Sheppard v. Yocum and De Lashmutt, 10 Or. 402; State v. Abrams, 11 Or. 169; State v. Lurch, 12 Or. 104.

On the trial of a case of rape on a child, where the court

**Evidence (continued).**

has excluded the child from testifying on account of her not possessing sufficient age and intelligence, her declarations as to the circumstances of the alleged rape, made at the time, cannot be received as evidence: *State v. Tom*, 8 Or. 117.

Declarations of deceased person or persons out of the state are admissible, when they are relatives, as evidence of pedigree: *Thompson v. Woolf*, 8 Or. 454.

But the person must be proved a relative otherwise than by his declarations alone: *Id.*

Declarations of owner of real property, while in possession, impeaching her title, are admissible against her grantee, but not declarations in her favor except accompanying her possession and explanatory of her acts of ownership: *Besser v. Joyce*, 9 Or. 310.

Her declarations that she had purchased of a particular person, and paid a definite sum out of a certain fund, are not admissible as evidence of such facts: *Id.*

Declarations amounting to mere expressions of opinion of former owner do not overcome proof of common reputation of boundary: *Goddard v. Parker*, 10 Or. 102.

Evidence proving motive for falsehood in making declarations in disparagement of title, admissible: *Long and Spaur v. Lander*, 10 Or. 175.

The issue being as to the good faith of a sale, conversation between the parties relative thereto, at the time, is admissible: *Bergman and Berry v. Twilight*, 10 Or. 337.

Declarations of party in his favor, in criminal or civil cases, admissible only as *res gestæ*: *State v. Anderson*, 10 Or. 448.

When such declarations of the defendant are admissible in his behalf to negative the existence of a criminal design: *Id.*

Declarations of vendor after parting with his interest are not admissible to impeach the title of his vendee: *Krewson v. Purdom*, 11 Or. 266.

Declarations of hostility by witness, when proof of admissible: *State v. Stewart*, 11 Or. 52; *S. C.*, 11 Or. 238; *State v. Mackey*, 12 Or. 154.

Declarations of a party's agent are not admissible in his favor: *Jones v. Kearns*, 11 Or. 280.



**Evidence (continued).**

Statement by an attorney to his client is not admissible in favor of the latter to prove a fact stated: *White v. Rayburn*, 11 Or. 450.

Declarations of a party as to his physical condition, made while suffering from sickness or injury, are admissible in his favor: *State v. Mackey*, 12 Or. 154.

Letter to defendant, written by daughter of plaintiff, in action for seduction, and defendant's oral reply, admissible in behalf of plaintiff: *Lee v. Cooley*, 13 Or. 433.

**13. DYING DECLARATIONS.**

The only declarations of deceased admissible are dying declarations, or those which are part of *res gestæ*: *Goodall v. State*, 1 Or. 333.

When dying declarations are admitted, it is competent to show deceased was a disbeliever in a future state of rewards and punishments: *Id.*

No dying declaration admissible but those of the person for whose murder the indictment is found: *State v. Fitzhugh*, 2 Or. 227.

Dying declarations must be concerning cause of death, and made with consciousness of the approach of death: *State v. Garrand*, 5 Or. 216.

Dying declarations are admissible for or against the accused in the discretion of the court: *State v. Ah Lee*, 7 Or. 237; *State v. Saunders*, 14 Or. 300; *Thompson v. Territory*, 1 W. T. 548.

Their admissibility is not confined to cases where no other evidence is obtainable as to the killing: *State v. Saunders*, 14 Or. 300.

Must be confined to facts, not conclusions; such that the deceased would have been competent to testify to if sworn as witness: *Id.*

"He shot me down like a dog," is not such a conclusion as to be excluded under this rule: *Id.*

Constitutional provision that accused shall have the opportunity to face witnesses does not affect admissibility of such evidence: *Id.*

Objection to dying declarations, that deceased was an unbeliever and an infidel, come too late after verdict found against the prisoner: *Hartigan v. Territory*, 1 W. T. 447.

**Evidence (continued).**

Where the record does not disclose the showing upon which dying declarations were admitted, the presumption on appeal is that it was sufficient: *Thompson v. Territory*, 1 W. T. 548.

On objection to the admission of a declaration that "he firmly believed that T. struck him willfully and maliciously," the court struck out "willfully and maliciously," and admitted the evidence; held, the ruling was favorable to the accused, and no prejudice: *Id.*

**14. CONFESSIONS.**

When a conversation is admissible as confession, what each party thereto said may be admitted: *State v. Taylor*, 3 Or. 10.

Admissions on advice of arresting officer, when may be regarded as evidence: *State v. Leonard*, 3 Or. 157.

Common-law rule excluding confessions induced by influence of hope is not altered by section 169 of the Criminal Code (sec. 1368, Hill's A. L.): *State v. Wintzingerode*, 9 Or. 153.

After one confession is obtained by promises, subsequent confession is not admissible, unless the facts show that the influence has ceased to operate: *Id.*

Whether such influence has ceased to operate is a question for the trial court, and its decision will not be reviewed unless bill of exceptions shows the discretion was abused: *Id.*

Confessions of one of several confederates, made after the enterprise was affected, bind only himself, and not his confederates: *Sheppard v. Yocum and De Lashmutt*, 10 Or. 402.

As preliminary to proof of admissions by prisoner, the whole conversation need not be given in evidence: *Yelm Jim v. Territory*, 1 W. T. 63.

Cross-examination affords means of obtaining full statement: *Id.*

**15. REPUTE.**

Reputation not admissible to prove dedication within memory of living persons: *McEwan v. Portland*, 1 Or. 300.

Not admissible except to prove matters of public and general interest, and not a particular fact: *Id.*

**Evidence (continued).**

Reputation as to ownership of private property admissible in Oregon: *Wilson v. Maddock*, 5 Or. 480; *Bartel v. Lope*, 6 Or. 321.

The opinion of the witness as to whom the common repute ascribes the ownership, not admissible: *Id.*

Common repute, under the statute, is evidence of boundary: *Goddard v. Parker*, 10 Or. 102.

Boundary proved by reputation is presumed in conformity with the original location, and not overcome by contradictory expressions of opinion of former owner: *Id.*

**16. PERPETUATION OF EVIDENCE.**

Granting of petition discretionary; notice to adverse party may be required: In the Matter of *Carter*, 3 Or. 293.

Proceeding should not be used to ascertain what adverse witness will testify: *Id.*

Amendment of section 805 of the Code (sec. 815, Hill's A. L.), concerning equity practice, it seems, leaves no provision for taking deposition of a witness in equity case, even *de bene esse*, unless reference has been made to find the facts, or the facts and the law: *Marks & Co. v. Crow*, 14 Or. 382.

**17. GENERALLY AND RELEVANCY.**

Proof of a delivery of wheat in April, 1857, will prove allegation, "heretofore, to wit, about and previous to October 1, 1857": *Jackson v. Sharff and Hill*, 1 Or. 246.

An uncertified tax list is not relevant in suit on sheriff's bond for not returning certified tax list: *Fargo v. County Commissioners*, 1 Or. 262.

In action for agreed price, when the evidence as to whether that price was agreed upon is conflicting, evidence of the value of the property sold was admitted as a circumstance tending to disprove the alleged agreement: *Brown v. Cahalin*, 3 Or. 45.

Proof of the state of accounts was admitted, as tending to contradict a claim of payment by a release of prior indebtedness: *Id.*

What land brought at sheriff's sale is no proof of its value: *Willamette Falls C. & L. Co. v. Kelly*, 3 Or. 99.

Consultations of surgeons in malpractice case, not admissible except as part of *res gestæ*: *Williams v. Poppleton*, 3 Or. 139.

**Evidence (continued).**

Which of two recognized surgical systems may be best, not questioned in such case: *Id.*

Value of coin in currency, or custom of banks to pay checks in coin, not admissible, in action to recover for gold coin loaned, to show value of the loan: *Davis v. Mason*, 3 Or. 154.

Where pleadings admit an agreed price for labor, reasonable value not provable: *Id.*

Where contract to pay at fixed rate was void for not being in writing, reasonable value admissible: *Id.*

In action to condemn land held by one corporation, evidence of the transactions of that corporation is not admissible to prove that the land is held by it to prevent competition: *Oregon Cascade R. R. Co. v. Baily*, 3 Or. 164.

The articles of incorporation, and the general incorporation law, is the evidence of the powers of a corporation: *Id.*

Quiet and exclusive possession, evidence of a title until a better is shown: *Oregon Cascade R. R. Co. v. Oregon Steam Nav. Co.*, 3 Or. 178.

Proof of value of land condemned at the time of the commencement of the action determines the amount to be paid therefor: *Or. & Cal. R. R. Co. v. Barlow*, 3 Or. 311.

In action for work and labor, defense that plaintiff did not work diligently is not admissible unless pleaded: *Albee v. Albee*, 3 Or. 321.

The whole judgment roll is admissible to dispute jurisdiction recited in a part thereof; administrator's sale may be impeached by the record: *Gilmore v. Taylor*, 5 Or. 89.

In divorce suit, preponderance of proof sufficient, though the charge is of crime: *Smith v. Smith*, 5 Or. 188.

Evidence of attempts to escape, admissible against prisoner, and tends to prove guilt: *State v. Garrand*, 5 Or. 216.

Proof of personal indignities, and general demeanor of defendant toward plaintiff, may be sufficient to prove breach of contract to support an infirm and aged person: *Tippin v. Ward*, 5 Or. 450.

Lease for two years in writing being alleged, proof of verbal lease for two years is not admissible as establishing



**Evidence (continued).**

- lease for one year good under statute of frauds: *Noyes v. Stauff*, 5 Or. 455.
- Deposition taken in different proceeding between other parties to prove marriage, not admissible under section 819 of the Code (sec. 829, Hill's A. L.): *Murray v. Murray*, 6 Or. 26.
- Proof of cohabitation and recognition as man and wife in society, *prima facie* proof of marriage in civil suits: *Id.*
- On the question of value of town lots, proof of nearness to city, cost of grading streets adjoining, etc., is relevant: *Arrigoni v. Johnson*, 6 Or. 167.
- What proof of damage is admissible in action for obstructing stream and overflowing plaintiff's land: *Marsh v. Trullinger*, 6 Or. 356.
- Nature and weight of evidence sufficient to set aside a will for fraud and undue influence: *Greenwood v. Cline*, 7 Or. 17.
- Promissory note is *prima facie* evidence of a settlement: *Matasce v. Hughes*, 7 Or. 39.
- Historical works are not admissible to prove the unwritten law of a foreign country: *State v. Moy Looke*, 7 Or. 54.
- Evidence of general conduct toward an infant, as proving or rebutting malice, is admissible in action for assault and battery: *Smith v. Harris*, 7 Or. 76.
- Flight of defendant when charged with the offense may be shown by the plaintiff in an action for seduction: *Parker v. Monteith*, 7 Or. 277.
- Proof that the seduction was accomplished under promise of marriage is admissible: *Id.*
- Uncorroberated testimony of accomplice will not warrant conviction: *State v. Odell*, 8 Or. 30.
- That prisoner was in the same town at the time is not sufficient corroboration: *Id.*
- Evidence, on an appeal from an order staying execution, cannot be introduced in the Supreme Court for the first time: *Bentley v. Jones*, 8 Or. 47.
- To prove value of horses killed on railroad, purchase price not material: *Holstein v. O. & C. R. R. Co.*, 8 Or. 163.
- Proof of former accident in same place not admissible in action for injury to passenger: *Davis v. O. & C. R. R. Co.*, 8 Or. 172.

**Evidence (continued).**

Slight evidence, tending to prove some of the issues, is admissible: *Elkins v. Parrish*, 8 Or. 330.

Court has discretion to admit evidence on promise of attorney to make the same material by other evidence to be introduced: *Bennett v. Stephens*, 8 Or. 444.

After order of interpleader has been made, evidence affecting the good faith of the plaintiff is not admissible: *Fahie v. Lindsay*, 8 Or. 474.

Return of *nulla bona* is but one kind of proof of insolvency, and it may be proved otherwise: *Hodges and Wilson v. Silver Hill Mining Co.*, 9 Or. 200.

In action on bond, testimony of sureties that they do not recollect having signed is of little weight as against positive evidence: *Howe v. Taylor*, 9 Or. 288.

General notoriety of the fact that a father would not be responsible for a son's debts is not evidence to charge with notice a person dealing with them: *Smith v. Cox*, 9 Or. 475.

Evidence that purchaser was shown boundaries of land, and knew that they were not as described in deed, admissible on question of fraud: *Id.*

Evidence reviewed and held not sufficient to charge notice of unrecorded deed: *Boehreinger v. Creighton*, 10 Or. 42.

Proof that maker, at the time of signing a note, was able to pay the note, is not admissible to raise presumption that he signed the same for the accommodation of an indorser: *Whitlock and Manciet v. Bigne*, 10 Or. 166.

In action for assault and battery, proof of conveyance by defendant of his property after action begun, under suspicious circumstances, may be submitted to the jury as an implied admission of guilt: *Heneky v. Smith*, 10 Or. 348.

In action to condemn right of way, evidence of an endeavor to agree as to compensation is a prerequisite to suit: *O. R. & N. Co. v. Oregon Real Estate Co.*, 10 Or. 444.

When it becomes material, the identity and condition of a hat, not produced, may be shown by oral evidence: *Heneky v. Smith*, 10 Or. 349; *State v. Abrams*, 11 Or. 169.

**Evidence (continued).**

When the defendant in a criminal case offers evidence that he was intoxicated at the time of the commission of the act, the prosecution may show in rebuttal what the defendant did and said when seen by witness a few minutes before, as facts from which the jury may form an opinion: *State v. Abrams*, 11 Or. 169.

Experiments by firing a gun at pasteboards to prove, by powder-burns, distance of shot when fired, are not admissible: *State v. Justus*, 11 Or. 178.

Board painted with Chinese characters admitted as evidence for the jury, with other evidence as to whether it contained rules adopted by the Joss-house Company: *Chung Yow v. Hop Chong*, 11 Or. 220.

Agent may testify in what capacity and for whom he was acting as agent for one or another: *Bennett v. N. P. Ex. Co.*, 12 Or. 49.

Marriage may be proved by eye-witnesses or the parties, in crim. con. cases: *Jacobsen v. Siddal*, 12 Or. 280.

In an action for damages for ejectment from a train, plaintiff must prove, not who was owner, but who was using the train: *Sullivan v. Oregon R'y & N. Co.*, 12 Or. 392.

Evidence is admissible in an action on an account stated, to show that certain matters were not included in the settlement: *Normandin v. Gratton*, 12 Or. 505.

Evidence that accused obtained a gun at a distant place, and was seen at different places carrying it towards the place of the murder, is not rebutted by proof that he was seen at one place on the way without the gun: *State v. O'Neil*, 13 Or. 183.

In a criminal action, testimony that has any possible bearing upon the defendant's case should not be excluded: *State v. Mah Jim*, 13 Or. 235.

Co-tenant, who has redeemed the property from tax sale, and who claims to retain possession until reimbursed, may be shown to have been in receipt of all the profits during the time: *Minter v. Durham*, 13 Or. 470.

Party relying on a decree as a part of his proof of title should introduce the same in chief, that opposite party may have opportunity to meet it: *Walker v. Goldsmith*, 14 Or. 125.

Evidence that officers of city improved a sidewalk several

**Evidence (continued).**

times, may go to the jury on the question whether the *locus* was a municipal thoroughfare: *Sheridan v. City of Salem*, 14 Or. 328.

Held, there was no evidence tending to show a state of war among Indians in any wise affecting this case: *Yelm Jim v. Territory*, 1 W. T. 63.

The circumstance of a person voting in another state, at a presidential election, would not establish his residence out of the territory, against his sworn statement of residence and intention of returning: *Clarke v. Territory*, 1 W. T. 68.

In mitigation of damages claimed for continued imprisonment, it may be shown that the person imprisoned refused to accept bail: *Ferguson v. Tobey*, 1 W. T. 275.

A mere blow inflicted upon the defendant, nothing appearing to show its severity or other physical consequence, is not evidence from which insanity can be inferred: *McAllister v. Territory*, 1 W. T. 360.

Written testimony is that which, after it is written out, the witness assents to as that to which he makes oath, and his assent should be expressed by his signature: *Coleman v. Yesler*, 1 W. T. 591; *Seattle & W. W. R. R. Co. v. Ah How*, 2 W. T. 36.

Difference between an exhibit and the testimony of a witness, whether oral or written, pointed out: *Doctor Jack v. Territory*, 2 W. T. 101.

**Examination of Witnesses.** See Witnesses.

**Exceptions.** See Appeal and Error; Jury and Jury Trial.

**Executions, and Proceedings Supplemental.** See Mortgages; Sheriffs; Taxation.

1. WHAT SUBJECT TO EXECUTION.
2. FORM AND ISSUING.
3. CONTROL OF THE COURT.
4. THE LEVY.
5. THE RETURN.
6. THE SALE.
7. CONFIRMATION.
8. SHERIFF'S DEED.
9. REDEMPTION.
10. RIGHTS AND LIABILITIES OF OFFICERS.
11. VALIDITY AND RIGHTS OF PARTIES.
12. PROCEEDINGS SUPPLEMENTAL.



**Executions (continued).****1. WHAT SUBJECT TO EXECUTION.**

Equitable title in land cannot be sold on execution: *Smith v. Ingles*, 2 Or. 43; *Bloomfield v. Humason*, 11 Or. 229.

Exemption must be claimed at the time; what is a waiver: *White v. Thompson*, 3 Or. 115.

Homestead entry commuted to pre-emption, not liable for debts incurred before patent: *Clark v. Bayley*, 5 Or. 343.

Land of married woman, married before adoption of constitution, is exempt from execution for husband's debts under section 5, article 15, of the constitution: *Rugh v. Ottenheimer*, 6 Or. 231.

A revenue cutter of the United States is not subject to process from the state courts: *Goldsmith v. The Revenue Cutter*, 6 Or. 250.

A pledgor's interest in property pledged, with a limited power of sale for the protection of the pledgee, may be levied upon and sold under execution against the pledgor: *Williams v. Gallick*, 11 Or. 337.

Mortgagee of chattel mortgage has no right in the property subject to execution: *Knowles v. Herbert*, 11 Or. 54; S. C., 11 Or. 240.

The property of a corporation in the hands of a stockholder, not having been declared a dividend, is subject to execution on a judgment against the corporation: *Hughes v. Oregonian R'y Co.*, 11 Or. 158.

A watch of moderate value may be exempt as wearing apparel, when all claimed is not of value beyond the statutory limit: *Stewart v. McClung*, 12 Or. 431.

The burden is on the debtor claiming exemption to prove affirmatively all facts to establish it: *Id.*

Where one buys chattels in his own name, but as agent for another, the property is not subject to execution on a judgment against the former: *Sires v. Newton*, 1 W. T. 356.

**2. FORM AND ISSUING.**

An execution is a writ within section 1 of the Practice Act of 1851: *Stephens v. Dennison and Norton*, 1 Or. 19.

May command sheriff to make "due return thereof," instead of to return it "within thirty days" under said act: *Id.*

**Executions (continued).**

In issuing execution on lapsed judgment, court may inquire into validity of the judgment: *Hunsaker v. Coffin*, 2 Or. 107.

Filing transcript, on appeal from Justice's Court, not sufficient docketing in the Circuit Court to warrant issuing an execution from the latter court: *Chapman v. Raleigh*, 3 Or. 34.

Execution to sell the premises may issue on judgment to enforce mechanic's lien: *Kendall v. McFarland*, 4 Or. 292.

Cannot be issued for additional costs after satisfaction of judgment of record: *Snipes v. Beezley*, 5 Or. 420.

Mere levy on personal property, which is subsequently returned, does not prevent issuing another execution: *Wright v. Young*, 6 Or. 87.

Direction to levy on "real estate, goods, and chattels" in writ is informal, but writ is not void: *Id.*

On proceeding to obtain leave to issue writ on dormant judgment, what questions considered: *McCracken v. Swartz*, 5 Or. 62; *Ladd v. Higley*, 5 Or. 296; *Strong v. Barnhart*, 5 Or. 496; S. C., 6 Or. 93.

May issue on judgment by confession: *Allen v. Norton*, 6 Or. 344.

Is the proper method of enforcing lien of state for costs of criminal cases: *State v. Munds*, 7 Or. 80.

Not necessary to issue on judgment where property is attached, in order to sustain bill in equity to set aside sale under a fraudulent decree: *Bremer & Co. v. Fleckenstein and Mayer*, 9 Or. 266.

Not necessary to issue, where the judgment is a lien, before proceeding in equity to set aside a fraudulent conveyance or encumbrance: *Multnomah St. R'y Co. v. Harris*, 13 Or. 198.

**3. CONTROL OF THE COURT.**

Under power granted the court under section 100 of the Civil Code, to relieve party, no necessity for resorting to equity to stay execution: *Wells, Fargo, & Co. v. Wall*, 1 Or. 295.

Every court has power to control its own process to prevent its abuse: *Provost v. Millard*, 3 Or. 370.

The court refused to recall an execution, or require party

**Executions (continued).**

to satisfy of record a decree in his favor, rendered by a court in another district, which it is claimed has been satisfied in fact: *Id.*

On filing an undertaking for stay of proceedings on appeal, the Circuit Court may recall an execution issued: *Bentley v. Jones*, 8 Or. 47.

**4. THE LEVY.**

Levy on personalty subsequently returned is not a satisfaction, and another execution may issue: *Wright v. Young*, 6 Or. 87.

On personalty in the hands of third person who has a lien, or who has not, is trespass: *Spaulding v. Kennedy*, 6 Or. 208.

Officer cannot justify under such attempted levy, in action for the recovery of the property: *Id.*

Levy is unnecessary before sale on execution upon a decree of foreclosure: *Bank of British Columbia v. Page*, 7 Or. 454.

Action on his bond, and not *mandamus*, is the proper remedy when the sheriff refuses or neglects to levy: *Habersham v. Sears*, 11 Or. 431.

Sheriff has no authority to decide that his levy is subordinate to another placed on the property by a constable, *Schneider v. Sears*, 13 Or. 69.

**5. THE RETURN.**

"In default of personal property," sufficient statement in return after levy and sale of real estate: *Griswold v. Stoughton*, 2 Or. 61.

Return of *nulla bona* is but one kind of proof of insolvency, and the fact may be proved otherwise: *Hodges and Wilson v. Silver Hill Mining Co.*, 9 Or. 200.

**6. THE SALE.**

Statutory requirement that known lots or parcels be sold separately is directory: *Griswold v. Stoughton*, 2 Or. 61; *Dolph v. Barney*, 5 Or. 192; *Bank of British Columbia v. Page*, 7 Or. 454.

Proof of sale is properly made by introducing the judgment roll as preliminary evidence: *Gilmore v. Taylor*, 5 Or. 89.

Except in case of abuse, the sheriff's discretion to sell town lots separately or together ought not to be questioned: *Bank of British Columbia v. Page*, 7 Or. 454.

**Executions (continued).**

Irregularities in stating incorrectly in the execution the amount or names are treated as having been amended, on collateral attack: *Jones v. Dove*, 7 Or. 467.

Resale after appeal and modification of decree must conform to subdivisions 3 and 4 of section 293 of the Code (sec. 296, Hill's A. L.): *Trullinger v. Kofoed*, 8 Or. 436.

Sale may be enjoined in equity when it will cloud the title to realty: *Cox v. Smith and Forward*, 10 Or. 418; *Wilhelm v. Woodcock*, 11 Or. 518.

**7. CONFIRMATION.**

Judgment debtor, or his representatives after his death, are the parties to object to confirmation: *Miller v. Bank of British Columbia*, 2 Or. 291.

Judgment creditor, not a party to judgment, cannot object to confirmation: *Miller v. Oregon City Mfg. Co.*, 3 Or. 24.

Confirmation is a final adjudication touching regularity of the proceedings, and conclusive as to all persons in any other suit or proceeding: *Matthews v. Eddy*, 4 Or. 225; *Dolph v. Barney*, 5 Or. 192; *McRae v. Daviner*, 8 Or. 63.

Confirmation of all sales on execution, by the Circuit Court upon submission of the deed, was necessary and proper practice prior to June 1, 1863: *Wright v. Young*, 6 Or. 87.

Omission to indorse approval of the court on the deed does not render it void: *Id.*

Order of confirmation is conclusive as to regularity of proceedings after execution and before confirmation: *Id.*

Order of confirmation is appealable: *Dell v. Estes and Carter*, 10 Or. 359.

Objections must be filed within the time allowed by statute, and cannot be filed afterwards without leave obtained from the court: *Id.*

Description in order of confirmation held insufficient to identify the land: *Swift v. Mulkey*, 14 Or. 59.

**8. SHERIFF'S DEED.**

Recitals in, and irregularities in; effect of confirmation: *Mathews v. Eddy*, 1 Or. 225.

Where all steps have been regularly taken, recitals are *prima facie* evidence, and deed is evidence of title: *Dolph v. Barney*, 5 Or. 192.



**Executions (continued).**

May be executed by the sheriff in office when deed is due, after time for redemption: *Moore v. Willamette T. & L. Co.*, 7 Or. 359.

Deed to land held by fee-simple conditional title with limitation over by executory devise, made on sheriff's sale before the happening of the condition, conveys fee-simple title: *Rowland v. Warren*, 10 Or. 129.

**9. REDEMPTION.**

After time for redemption is past, judgment debtor cannot upon mere motion have sale set aside: *Griswold v. Stoughton*, 2 Or. 61.

In case of foreclosure of a number of mortgage liens: *Chavener v. Wood*, 2 Or. 182.

On redemption, effect of sale is terminated, and premises must be restored to their original condition: *Cartwright v. Savage*, 5 Or. 397.

Judgment debtor, on redeeming, may recover value of crop growing at time of sale, and harvested by purchaser while in possession: *Id.*

Who may redeem on foreclosure of mortgage, and on what terms: *Chavener v. Wood*, 2 Or. 182; *Atkinson v. Morrissey*, 3 Or. 332; *Abraham v. Chenoweth*, 9 Or. 348; *Sellwood v. Gray and De Lashmutt*, 11 Or. 534; *Parker v. Dacres*, 2 W. T. 439.

Mortgagee not made a party need not redeem, but may foreclose as if no sale was made: *Besser v. Hawthorn*, 3 Or. 129; *S. C.*, 3 Or. 512.

Redemption, in the sense of the statute, is not a common-law but an equity term: *Abraham v. Chenoweth*, 9 Or. 348.

The right of the purchaser in possession before redemption is an equitable estate: *Id.*

After time for redemption expires, by the sheriff's deed, his equitable estate becomes a legal estate by merger: *Id.*

Redemption from tax sale differs in that respect from redemption from judicial sale: *Id.*

On foreclosure of wife's mortgage after her death, husband failing to redeem, he has no right by curtesy as against a person redeeming, who has also acquired the interest of the wife's children in the property: *Id.*

Right to redeem applies only to sales on execution, not to

**Executions (continued).**

foreclosure sales in Washington Territory: *Parker v. Dacres*, 2 W. T. 439.

**10. RIGHTS AND LIABILITIES OF OFFICERS.**

Officer protected by process, valid on its face; not so justice or party improperly issuing: *White v. Thompson*, 3 Or. 115.

Sheriff liable for failure to levy where judgment creditor is injured: *Moore v. Floyd*, 4 Or. 101.

Where sheriff fails to make return or to levy, it is presumed that plaintiff in execution has lost his debt, and burden is on the sheriff to show otherwise: *Id.*

Sheriff must obey writ in due form, and cannot refuse to execute or return, and thus require the parties to determine the legality of the judgment: *Richards v. Nye*, 5 Or. 382.

Sheriff is not bound, when he takes money conditionally from debtor, to allow him longer than until the end of the time for return, to test the legality of execution: *Id.*

Verdict of a jury under section 284 of the Code (sec. 287, Hill's A. L.) operates as full indemnity to sheriff: *Remdall v. Swackhamer*, 8 Or. 502; *Capital Lumbering Co. v. Hall*, 9 Or. 93; *Hexter v. Schneider*, 14 Or. 184.

When verdict is against the claimant, he cannot afterward maintain action of replevin against the sheriff for the goods: *Capital Lumbering Co. v. Hall*, 9 Or. 93.

Clerk is not entitled to collect commissions on moneys not actually coming to his hands: *Jackson v. Siglin*, 10 Or. 93.

Action on bond, and not *mandamus*, is proper remedy for failure of officer to levy: *Habersham v. Sears*, 11 Or. 431.

The essential allegations, in a complaint against a sheriff for neglect to pay over money realized on executions, are the existence of the judgment, the issuing of the writ, the realization of the money, and the neglect to pay it over: *Schneider v. Sears*, 13 Or. 69.

Sheriff having levied on personalty as the property of one person, when sued in conversion by another, may defend by showing the title is in a third party: *Krewson & Co. v. Purdom*, 13 Or. 563.

Verdict of jury, called by officer to try the title to goods taken on execution, while protecting the sheriff, does

**Executions (continued).**

not conclude the owner from maintaining action against the purchaser on execution sale: *Hexter v. Schneider*, 14 Or. 184.

Sheriff is not entitled to commission on execution sales, where judgment creditor bids in the property, and no money passes to the sheriff: *Coleman v. Ross*, 14 Or. 349.

**11. VALIDITY AND RIGHTS OF PARTIES.**

Judgment creditor purchasing is chargeable with all irregularities, but a stranger purchasing is charged with substantive defects only: *Stephens v. Dennison and Norton*, 1 Or. 19.

Execution will not be set aside because writ directed sheriff to make "due return thereof" instead of to return the same within thirty days: *Id.*

Validity of judgment will not be questioned on mere motion after sale: *Griswold v. Stoughton*, 2 Or. 61.

Objection that two or more parcels were sold in gross is not considered on such motion: *Id.*

Plaintiff in execution purchasing extinguishes the specific lien of his mortgage foreclosed: *Chavener v. Wood*, 2 Or. 182.

Purchaser with knowledge of equitable rights in another will be postponed to those rights: *Stannis v. Nicholson*, 2 Or. 332.

Sale on execution upon judgment without foreclosure of mortgage securing the debt valid: *Mathews v. Eddy*, 4 Or. 225.

Purchaser entitled to enter, use, and occupy, for purposes such as premises can put to for time he is in: *Cartwright v. Savage*, 5 Or. 397.

But on redemption the purchaser will be required to repay to the judgment debtor the value of a growing crop harvested while he was in possession: *Id.*

Where two executions issued simultaneously on same judgment, and but one was executed, proceeding was irregular, but waived by not having taken advantage by motion to quash: *Wright v. Young*, 6 Or. 87.

Executions issued without authority are void, but issued with authority which is erroneously pursued voidable, and on collateral attack irregularities are ignored: *Jones v. Dove*, 7 Or. 467.

**Executions (continued).**

Purchaser depends on the judgment, levy, and deed; other questions are between the parties to the judgment and the sheriff: *McRae v. Daviner*, 8 Or. 63.

Former purchaser is to be first repaid on applying the moneys realized from resale: *Trullinger v. Kofoed*, 8 Or. 436.

Purchaser, under judgment against a married woman upon a note signed by her as surety, takes good title where the record does not show she was a married woman: *Farris v. Hayes*, 9 Or. 81.

Equity will not set aside sale void on its face for want of notice to defendant of the action, where there is a remedy by ejectment: *Id.*

Purchaser is entitled to immediate possession, unless there be a tenant holding over: *Bank of British Columbia v. Harlow and Page*, 9 Or. 338.

Undertaking on appeal from confirmation, providing for payment of value of the use if the order is affirmed, is not provided for by law, and does not bind sureties: *Id.*

Such undertaking gives appellant no right of possession: *Id.*

Action for money had and received lies to recover money paid by purchaser at execution sale, where there is no judgment upon which execution issues: *Hoxter v. Poppleton*, 9 Or. 461.

The ordinary rule of *caveat emptor* does not apply in such case: *Id.*

Purchaser without notice on execution against a grantor of land, who by reason of defect in conveyance has the legal title thereto, has superior rights to the grantee: *Bloomfield v. Humason*, 11 Or. 229.

Rule of *caveat emptor* applies; good faith of purchaser avails nothing against the true owner who is not a party to the process: *Hexter v. Schneider*, 14 Or. 184.

Claimant of property sold on execution is not concluded by verdict of sheriff's jury adverse to him from bringing replevin against purchaser: *Id.*

Chattels of principal, purchased by agent in his own name, cannot be sold on execution against the agent: *Sires v. Newton*, 1 W. T. 356.



**Executions (continued).****12. PROCEEDINGS SUPPLEMENTAL.**

Are legal, not equitable; foreclosure cannot be enforced therein: *Knowles v. Herbert*, 11 Or. 54; S. C., 11 Or. 240.

Against garnishee are proceedings at law, and not in equity, and notice of appeal must specify errors sought to be reviewed: *Williams v. Gallick*, 11 Or. 337.

Right to supplemental proceedings under statute could not be cut off or summarily taken away by force of a new statute without allowing reasonable time for limitation: *Murne v. Schwabacher Bros. & Co.*, 2 W. T. 130.

Affidavit in such proceedings may, by permission, be amended to conform to the original proceeding: *Id.*

Such proceedings under the Code take place of creditor's bill, and therefore are to be heard and determined by the judge without jury: *Id.*

When new party should be brought in: *Murne v. Schwabacher Bros. & Co.*, 2 W. T. 130; S. C., 2 W. T. 191.

The proceedings are of equitable cognizance, though attached to a law case: *Murne v. Schwabacher Bros. & Co.*, 2 W. T. 191.

Principal having knowledge of proceedings against his agent to apply, as the property of the agent, the property of the principal in agent's hands to the payment of the latter's debt must intervene, or cannot complain of loss: *Id.*

Party after arrest, and being advised of proceedings against him, cannot dispose of property, and avoid responsibility of applying it in satisfaction: *Id.*

**Executors.** See Administrators and Executors.

**Exemplary Damages.** See Damages.

**Exemptions.** See Executions, and Proceedings Supplemental.

**Experts.** See Evidence.

**Extortion by Threats.** See Threats.

**Factors.** See Brokers.

**False Imprisonment.** See Malicious Prosecution.

Assault with dangerous weapon is felony; private person, though not seeing the offense committed, may arrest the offender: *Lander v. Miles*, 3 Or. 35.

**False Imprisonment** (continued).

Preponderance of evidence of guilt of accused sufficient to justify arrest: *Id.*

Firing a gun on accused to secure his arrest justifiable only when necessary: *Id.*

**False Pretenses.**

Defendant accused of obtaining money on forged notes may prove in defense that the signatures were signed by him with authority: *State v. Lurch*, 12 Or. 95.

A note so signed is not a false writing: *Id.*

**False Representations.** See Fraud and Deceit.

**Family Expenses.** See Husband and Wife.

**Federal Relations.** See Admiralty; Constitutional Law; Courts; Jurisdiction; Public Lands; State.

**Fee-tail.**

Estates in fee-tail are abolished; estates of inheritance are subject to a general power of alienation: *Rowland v. Warren*, 10 Or. 129.

**Fees.** See Assessors; Attorneys; Bills and Notes; Compensation; Costs and Disbursements; County Clerks; Sheriffs.

Fees of officers may be paid in currency, and they have no right to demand coin: *Coffin v. Coulson*, 2 Or. 205.

Law requiring witness to demand his fees at the term when he is subpœnaed is not unconstitutional: *Lannahan v. Multnomah County*, 3 Or. 187.

Act of October 21, 1864, relating to fees in counties east of the Cascade Mountains, is an original act, and not amendatory: *Bird v. Wasco County*, 3 Or. 282.

Legislature may control unearned fees, except where prohibited by constitution: *Portland v. Besser*, 10 Or. 242.

Percentage of county treasurer for receiving school funds, allowed by a statute not referred to in a re-enactment of the law fixing the salary of the county treasurer, may still be retained by him for such duties: *Chatfield v. Washington County*, 3 Or. 318.

Sheriff's fees and mileage, construction and application of statute: *Howe v. Douglas County*, 3 Or. 488; *Crossen v. Earhart*, 8 Or. 370.

Indictment for charging unlawful fees by county clerk: *State v. Packard*, 4 Or. 157.

Fees and salary of police judge of city of Portland: *Port-*

**Fees (continued).**

land v. Denny, 5 Or. 160; Adams v. Multnomah County, 6 Or. 116.

County assessors are not entitled to mileage: Taylor v. Umatilla County, 6 Or. 401.

Fees of district attorney in foreclosure suits by school land commissioners: Claim of Ison, 6 Or. 465; Hazard's Appeal, 9 Or. 366.

Fees of district attorney in actions on official undertakings: Claim of Ison, 6 Or. 469.

No fee fixed by statute for coroner for summoning jury: Cook v. Multnomah County, 8 Or. 170.

The County Court has discretionary power to fix such fee in each case, and the exercise of the power is not subject to writ of review: Id.

Sheriff is not entitled to mileage in transporting convicts to the penitentiary: Crossen v. Earhart, 8 Or. 370.

Act to provide compensation of clerks and sheriffs in certain counties held unconstitutional as a local law: Manning v. Klippel, 9 Or. 367.

Statutes giving costs must be strictly construed: Jackson v. Siglin, 10 Or. 93.

Promise to pay fees not authorized by law is void and cannot be enforced: Id.

County clerk is not entitled to commission on money bid on sale on execution by the judgment creditor and not actually coming to the hands of the clerk: Id.

Sheriff and tax collector not distinct offices, and sheriff not entitled to additional compensation as tax collector: Lane v. Coos County, 10 Or. 123.

Chief of police is not entitled to fees as constable when acting as such in state cases: Portland v. Besser, 10 Or. 242.

Keeper's fees, for care of attached property, are chargeable upon the assets by the sheriff, and are not to be taxed as costs in the action: Schneider v. Sears, 13 Or. 69.

Disbursements and sheriff's fees in a trial of the right to property before a sheriff are not taxable as costs in the original action: Id.

Witness in criminal case is entitled to but two dollars per day and mileage, though subpoenaed out of the county: Sargent v. Umatilla County, 13 Or. 442.

**Fees** (continued).

Section 785 of the Civil Code (sec. 795, Hill's A. L.), providing for double fees to witnesses in certain cases, does not apply to criminal cases: *Id.*

Statute requiring witnesses residing within two miles of place of trial in criminal cases to attend without receiving fees is not unconstitutional as requiring particular services without compensation: *Daly v. Multnomah County*, 14 Or. 20.

Sheriff is not entitled to commission on execution sale, where judgment creditor bids in the property, and no money passes to the sheriff: *Coleman v. Ross*, 14 Or. 349.

**Felony.** See Criminal Law; Pardon.

**Feme Covert.** See Husband and Wife.

**Fences.** See Boundaries.

Neither railroad or adjoining owner is required by law to fence the line between them: *Oregon Central R. R. Co. v. Wait*, 3 Or. 91.

Common-law rule that owner is required to keep his cattle within his own close, under penalty of answering in damages for injuries, not in force in Oregon: *Campbell v. Bridwell*, 5 Or. 311.

Complaint in action for trespass by cattle must show a statutory fence maintained by plaintiff: *Id.*

But in absence of statute, owner of land need not maintain fence to sustain such action: *French v. Cresswell*, 13 Or. 418.

Statutory requirement to fence against certain specified kinds of stock, in Umatilla County, does not apply to sheep which are not mentioned: *Id.*

**Ferries.** See Highways.

Franchise does not belong of right to owner of soil, but he is entitled to preference if he applies before license is granted: *Gant v. Drew*, 1 Or. 35; *Mills v. Learn*, 2 Or. 215.

Cannot be established for one year; license must be perpetual: *Cason v. Stone*, 1 Or. 39.

County commissioners are final judges of necessity for: *Id.*

Appeals from commissioners' decisions to District Court: *Carothers v. Wheeler*, 1 Or. 194.

Before a county had a "court-house" where court was



**Ferries** (continued).

- regularly held, what sufficient posting of notices: *Drew v. Gant*, 1 Or. 197.
- What is sufficient bond under order granting license: *Id.*
- Circumstances of payment of license fee in particular case, held sufficient: *Id.*
- Charter fixing rates the same "as other ferries are or may hereafter be," rates may be changed by law: *Stephens and Frush v. Powell*, 1 Or. 283.
- Riparian owner has not the exclusive right to a ferry: *Mills v. Learn*, 2 Or. 215.
- Ferry landings in the line of a continuous highway are a part thereof: *Id.*; *Price v. Knott*, 8 Or. 438; *Montgomery v. Multnomah R'y Co.*, 11 Or. 344.
- The right and ownership of ferry, with such landings, confers a right to land on the banks: *Id.*
- The riparian owner, having had due notice and waived his rights, cannot object to another having the ferry: *Id.*
- License granted to another than riparian owner is a personal trust, and expires with death of grantee: *Knott v. Frush*, 2 Or. 237.
- Reservation in sale of franchise, for free ferriage for grantee and his family, construed: *Stephens v. Knott*, 2 Or. 304, overruling *Stephens v. Knott*, 3 Or. 50.
- Person employed by grantee, hauling lumber, included in family right to free ferriage: *Id.*
- Ferry license under act of 1854 is a franchise limited to a term of years: *Beckley v. Learn*, 3 Or. 470.
- Owner of lands may assert his right to preference, after expiration of a license: *Id.*; *Beckley v. Learn*, 3 Or. 544.
- Partner taking ferry and franchise in his own name, purchased for the firm with partnership property, held a trustee for the partnership: *Knott v. Knott*, 6 Or. 142.
- License granted by the territory to Stephens is perpetual, and need not be renewed by County Court: *Multnomah Co. v. Knott*, 6 Or. 279.
- Fines and forfeitures for maintaining ferry without license must be recovered in an action before a justice: *Id.*
- Passenger has no right to presume boat is landed when chain-guard is down, when personally notified otherwise: *Davis v. O. & C. R. R. Co.*, 8 Or. 172.

**Ferries (continued).**

Exclusive right granted by the territory to Stephens was limited to ten years, and expires by lapse of time: *Price v. Knott*, 8 Or. 438.

One ferry license limits the right to one line of boats which must ply between two certain points: *Id.*

Deed of ferry right construed as not exclusive, or permitting grantee to claim right to more than one ferry: *Knott Bros. v. Jef'n St. Ferry Co.*, 9 Or. 530.

Owners of one ferry cannot appear as parties contesting application of other parties to a license for a ferry at another point on same river: *Id.*

Ferry must be granted on the line of a highway, and can be granted at no other place: *Montgomery v. Multnomah County R'y Co.*, 11 Or. 344; *S. C.*, 12 Or. 25.

But one ferry can be licensed at one point on a river, and the grant is exclusive: *Id.*

County Court cannot grant ferry at side of another to accommodate same traveling public: *Id.*

Whether assignment of ferry license is void, *quære*: *Id.*; *Hackett v. Multnomah Railway Co.*, 12 Or. 124.

Right to object to the assignment of a ferry license as void is in the state, and must be exercised by the proper officers: *Id.*

Corporation may be joint with an individual owner in ferry franchise. and entitled to its share of the earnings, and may have an accounting in equity: *Id.*

**Fieri Facias.** See Executions, and Proceedings Supplemental.

**Filing Papers.** See Appeals; Records.

Presumption when "F. S. Holland, clerk," is indorsed on a notice of appeal is, that it is the F. S. Holland who was clerk of the court: *Carothers v. Wheeler*, 1 Or. 194.

What constitutes filing, and duties of clerk receiving paper without the fees for filing: *McDonald v. Crusen*, 2 Or. 258.

Placing paper among the files, with date of reception and clerk's name indorsed, is sufficient: *Id.*

A paper not marked "filed," but found among the papers of a case in the proper custody, and upon which the court apparently acted, is *prima facie* part of the record, and

**Filing Papers (continued).**

in fact filed: *Moore v. Willamette T. & L. Co.*, 7 Or. 367.

Notice must be served before undertaking on appeal is filed, and simply refileing the latter is insufficient: *Weiss v. Jackson County*, 8 Or. 529.

Undertaking filed by clerk, by excusable mistake, before notice of appeal was filed, he cannot refile or change the date of filing: *Hawthorne v. East Portland*, 12 Or. 210.

Indorsement on the original, of filing and recording, is not evidence of the recording: *Jewett v. Darlington*, 1 W. T. 601.

**Findings.** See Appeals; Practice; References.

**Fines and Forfeitures.**

Proceeding by indictment is an "action at law" to recover fines within the meaning of the act of 1876 to punish and prevent gambling: *State v. Carr*, 6 Or. 133.

Actions to recover, for maintaining ferry without license, must be brought before a justice: *Multnomah County v. Knott*, 6 Or. 279.

Statute creating the offense, and affixing penalty to be recovered in Justice's Court, gives justice exclusive jurisdiction of the offense: *Id.*

Action on official undertaking is not an action to recover fines and forfeitures under the statute allowing the district attorney ten per centum: *Claim of Ison*, 6 Or. 469.

Fines on conviction for selling liquor to Indians can only be collected in a civil action: *Fowler v. United States*, 1 W. T. 3.

**Fixtures.**

The true rule to determine what are fixtures is the character of the act and the intention in putting the structure in place: *Doscher v. Blackiston*, 7 Or. 143; *Oregon R'y & N. Co. v. Mosier*, 14 Or. 519.

Person who enters another's land with the intention of holding adversely cannot, after ouster, remove a building erected by him, though of wood resting on posts or blocks: *Id.*

The old rule that all things annexed to the realty are fixtures is much relaxed: *Oregon R'y & N. Co. v. Mosier*, 14 Or. 519.

**Fixtures** (continued).

A railroad track built by a company, which entered under a color of right, and which was not a mere trespasser, held not a fixture: *Id.*

**Forbearance.** See Bills and Notes; Suretyship.

**Forcible Entry and Detainer.** See Landlord and Tenant.

Title to land not inquired into in the action: *Shortess v. Wirt*, 1 Or. 90.

Verdict for plaintiff held to be proper in form: *Altree v. Moore*, 1 Or. 350.

Defendant cannot set up title paramount; possession is the only issue: *Id.*

In ejectment, plaintiff must set forth in his complaint the nature of his estate in the premises; otherwise his action is regarded as forcible entry and detainer: *Thompson v. Wolf*, 6 Or. 308.

Justices' Courts have jurisdiction to the exclusion of Circuit Courts: *Id.*

The object of the statute is to prevent and punish the use of forcible and violent means of obtaining or holding possession, irrespective of the question of actual title: *Taylor v. Scott*, 10 Or. 483.

Entry having been peaceful, the detainer must be proved to have been manifested by a show of actual force: *Id.*; *Harrington v. Watson*, 11 Or. 143.

Complaint sufficient if it follows the statute; need not allege service of notice to quit: *Chung Yow v. Hop Chong*, 11 Or. 220.

Service of notice to quit may be proved by parol: *Id.*

What sufficient description of property in notice: *Id.*

Forcible entry and detainer is not the remedy by widow to gain possession of the dwelling-house for her quarantine: *Aiken v. Aiken*, 12 Or. 203.

Undertaking for twice the rental value of the premises is a prerequisite to an appeal by a defendant from a judgment against him: *Danvers v. Durkin*, 14 Or. 37.

**Foreclosure.** See Mortgages.

**Foreign Law.** See Common Law; Evidence.

**Forfeiture.** See Eminent Domain; Fines and Forfeitures; Usury.

**Former Adjudication.** See Res Judicata.



**Forgery.**

Receipt for sixty-five dollars is not evidence to prove allegation in indictment of forging one for sixty dollars: *Shirley v. Oregon*, 1 Or. 269.

A note signed by one person with the name of another under the latter's direction is genuine note of the latter: *State v. Lurch*, 12 Or. 95.

Evidence of the genuine signature of name signed to note, for comparison, when admissible: *State v. Lurch*, 12 Or. 99.

Intent to defraud sufficient, though no defrauding is proved: *Id.*

Proof that signature to note is simulated and apparently in different handwriting from the body of the note, when admissible: *Id.*; *S. C.*, 12 Or. 104.

Indictment need not name the person defrauded; if named must be proved as alleged: *Id.*

**Former Recovery.** See *Res Judicata*.

**Franchise.** See *Corporations*; *Ferries*; *Eminent Domain*.

An office is not a franchise giving vested rights to fees and term in officer: *Oregon v. Pyle*, 1 Or. 149.

A ferry franchise is subject to regulation of rates by future legislation: *Stephens and Frush v. Powell*, 1 Or. 283.

Usurpation of franchise by corporations is to be remedied by action in the name of the state: *Kelly v. People's Trans. Co.*, 3 Or. 189.

Equity alone can protect the franchise of a road company against proceeding to lay out county road: *C. & G. Road Co. v. Douglas County*, 5 Or. 280.

Grant of a franchise strictly construed against grantee, and nothing passes by implication; it is not exclusive unless made so by the grant itself: *C. & G. Road Co. v. Stephenson*, 8 Or. 263.

Whether ferry franchise is assignable, *quære*: *Montgomery v. Multnomah R'y Co.*, 11 Or. 344; *S. C.*, 12 Or. 25; *Hackett v. Multnomah Railway Co.*, 12 Or. 124.

Corporation may be joint owner with individuals in a ferry franchise: *Hackett v. Multnomah Railway Co.*, 12 Or. 124.

**Fraud and Deceit.**

To set aside judgment, bill must show specific fraud: *Snyder v. Vannoy and Hyland*, 1 Or. 344.

**Fraud and Deceit (continued).**

Fraud, accident, or mistake must appear, or equity will not relieve from ignorance of fact: *Fahie v. Pressey*, 2 Or. 23.

Patent to land from the United States may be attacked for fraud and set aside: *Stark v. Stark*, 2 Or. 118.

Fraud in procuring judgment by confession should not be determined on motion and affidavit: *Miller v. Bank of British Columbia*, 2 Or. 291; *Miller v. Or. City Mfg. Co.*, 3 Or. 24.

Issues of, submitted to a jury in equity suit: *Hedges v. Paquett*, 3 Or. 77.

Fraud or mismanagement of directors of corporation not reviewed unless there is cause for winding up corporation: *Id.*

To avoid contract, misrepresentations must be of facts and have been acted upon: *Or. Central R. R. Co. v. Scoggin*, 3 Or. 161.

Arrest in civil cases is limited to cases of fraud designated in statute: *Norman v. Zieber*, 3 Or. 197.

Mental weakness and inadequacy of consideration combined give equity jurisdiction to set aside conveyance on the ground of undue influence: *Scovill v. Barney*, 4 Or. 288.

Party conveying to defraud creditors, if of weak mind, may have his conveyance set aside: *Id.*

Party may show that deed of commissioners of school land was obtained by fraud: *Hurst v. Hawn*, 5 Or. 275.

The essential allegations of a complaint on false representations: *Rolfes v. Russel*, 5 Or. 400; *Horrell v. Manning*, 6 Or. 413; *Smith v. Griswold*, 6 Or. 440.

Knowledge of the falsity must be alleged and proved: *Smith v. Cox*, 9 Or. 327.

Must have been asserted as facts, and not opinions, and have been known untrue: *Willamette Co. v. Gordon*, 6 Or. 175.

Fraud, as a ground for reformation, will not be considered where complaint merely alleges mistake: *Stephens v. Murton*, 6 Or. 193; but see *Baldock v. Johnson*, 14 Or. 542.

Party must have relied upon and been misled by the false representations: *Dunning v. Cresson*, 6 Or. 241;

**Fraud and Deceit** (continued).

Horrell v. Manning, 6 Or. 413; Nicolai v. Lyon, 8 Or. 56.

Where an estate is indebted to creditors, the administrator is a trustee for the creditors, and may show that a bill of sale of chattels made by his intestate fraudulently was intended as a chattel mortgage: Bartel v. Lope, 6 Or. 321.

Where a transaction can be explained without imputation of fraud, fraud is not to be presumed: Hurford v. Harned, 6 Or. 362.

Retention of chattels by vendor after sale creates a disputable presumption of fraud as against creditors, and the question of fraud should be left to the jury: Moore v. Floyd, 4 Or. 101; McCully v. Swackhamer, 6 Or. 438.

Equity will entertain jurisdiction, in case of fraudulent sale, where deceit is alleged, although an action for the deceit would lie: Smith v. Griswold, 6 Or. 440.

Nature and weight of evidence sufficient to set aside a will for fraud and undue influence: Greenwood v. Cline, 7 Or. 17; Hubbard v. Hubbard, 7 Or. 42.

Notice of fraud as affecting purchaser of note before maturity: De Lashmutt v. Everson, 7 Or. 212.

Sufficiency of evidence to prove fraud between executor and purchaser at executor's sale, whereby the purchaser obtained the property for less than its value: Brown v. Brown, 7 Or. 285.

Where a fiduciary relation exists, the burden is on the grantee to show a deed made to him was not obtained by undue influence: Gilmore v. Gilmore, 7 Or. 374.

Between parties engaged to be married, it is presumed the man exercises commanding influence: Id.

Equity will not relieve from a fraudulent act which worked no injury: Caples v. Steel, 7 Or. 491.

Purchaser of land is not required to disclose his knowledge of a mine thereon to the vendor: Id.

But a willful misstatement of the facts misleading the vendor will render the sale voidable: Id.

Fraudulent concealment by woman at time of marriage that she had been the mother of an illegitimate child, no ground for annulling marriage: Smith v. Smith, 8 Or. 100.

**Fraud and Deceit** (continued).

Undue influence must be clearly shown in order to warrant a court of equity in setting aside a deed: *Biglow v. Leabo*, 8 Or. 147.

Board of equalization may try question of fraud in borrowing and loaning to escape taxation: *Poppleton v. Yamhill County*, 8 Or. 337.

Complaint is insufficient merely charging fraudulent conduct not affecting rights of plaintiff: *Weiss v. Bethel*, 8 Or. 522.

Fraudulent concealment of property by bankrupt until his discharge does not prevent creditor, not made a party, from impeaching: *Besser v. Joyce*, 9 Or. 310.

It is no fraud on creditors for husband to bar his right to curtesy by joining his wife in her deed, on sale of her separate property: *Id.*

To prove defense of fraud in action on bond for a deed, proof that the plaintiff had been shown the boundaries intended, and knew the description in the bond to be different from that of the land intended to be conveyed, is admissible: *Smith v. Cox*, 9 Or. 475.

Instruction as to duty of one obtaining such bond from an ignorant and infirm person in reading over and explaining the same to him: *Id.*

Equity jurisdiction of fraud, and remedies in equity for actual and constructive fraud: *Shively v. Parker*, 9 Or. 500.

Facts held not to prove undue influence over woman signing stipulation in divorce case: *Savage v. Savage*, 10 Or. 331.

Judgment obtained by fraud in Justice's Court, against a defendant having a good defense, set aside in equity: *Marsh v. Perrin*, 10 Or. 364.

In a complaint in an action for deceit, the pleader must show wherein the representations were false; must state facts, and not conclusions: *Specht v. Allen*, 12 Or. 117; *Misner v. Knapp*, 13 Or. 135.

Inadequacy of price may be so gross as itself to furnish satisfactory evidence of fraud: *Archer v. Lapp*, 12 Or. 196.

Obtaining the property of an aged person on promise of paying, but without consideration, may be fraudulent conduct rendering the conveyance void: *Id.*



**Fraud and Deceit** (continued).

Undue influence which accomplishes its object is illegal, in whatever manner it was employed; each case must be judged by its own circumstances: *Parmentier v. Pater*, 13 Or. 121; *Ward v. Buckley*, 1 W. T. 279; *Hodgdon v. Crosby*, 1 W. T. 578.

Agent purchasing land from principal, without disclosing a better offer previously received from another person, takes undue advantage, and the deed will be set aside: *Savage v. Savage*, 12 Or. 459.

False and fraudulent representations vitiate accounts stated: *Kinney v. Heatley*, 13 Or. 35.

Wife carrying on business in her own name may employ her husband, and such employment is not a fraud on his creditors, and does not subject her property to his debts: *King v. Voos*, 14 Or. 91.

Husband may give his services in such case without compensation: *Id.*

But such arrangement is open to suspicion of fraud: *Id.*

Question of fraud in guardian's sale can be raised only by the pleadings: *Walker v. Goldsmith*, 14 Or. 125.

Answer charging fraud and misrepresentation as defense in an action upon a contract of guaranty under seal, held not to state a defense in law: *Marx v. Schwartz*, 14 Or. 177.

Lack of adequate consideration will have an influence in deciding whether a deed ought to stand or not, when it appears that the grantor did not know the extent of the interest or estate conveyed: *Baldock v. Johnson*, 14 Or. 542.

Child is presumed to be under the influence of parent so long as the dominion of the parent lasts, and in accepting a gift of land parent is presumed to influence: *Id.*

So where the daughter seventeen years of age, recently married, still lived with grantee, her mother, her deed made without consideration, in ignorance of her rights, ought not stand: *Id.*

If parties do not treat on equal grounds, equity will interfere for the protection of the weaker: *Ward v. Buckley*, 1 W. T. 279.

Equity will modify bargain so far as necessary to protect the weaker party, and for such purpose may rescind the contract: *Id.*

**Fraud and Deceit (continued).**

Where equity grants relief to those who have been overreached, it exacts equity as the condition upon which relief is granted: *Id.*

Right of a resident creditor to collaterally attack a discharge in bankruptcy for fraud: *Rosenthal v. Schneider*, 2 W. T. 144.

How far fraud and mistake are defense upon action on account stated: *Baxter v. Waite*, 2 W. T. 228.

Vendor who fraudulently shows to vendee lots of great value, representing them to be the lots to be sold, whereas the latter are worthless, and thereby defrauds vendee, is liable to action for damages for the difference in value: *Phinney v. Hubbard*, 2 W. T. 369.

**Fraudulent Conveyances.**

Absolute bill of sale unaccompanied by delivery is void as against creditors: *Monroe v. Hussey and Burbank*, 1 Or. 188.

Marriage is valuable consideration; deed not presumed fraudulent: *Bonser v. Miller*, 5 Or. 110.

Such deed may be set aside for fraud, where both parties concur in the fraud: *Id.*

Wife's separate property, not registered, is presumed the property of husband: *Elfelt v. Hinch*, 5 Or. 255.

Positive and express proof is not required, before a conveyance will be set aside; it may be deduced from circumstances: *Id.*

Voluntary conveyance by husband to wife presumed fraudulent as to existing creditors: *Id.*

Judgment creditors may unite to set aside such conveyance: *Id.*

Conveyance to daughter for services as housekeeper, where price was inadequate, held voluntary for excess, as against rights of divorced wife: *Barrett v. Barrett*, 5 Or. 411.

Payment by grantee, of existing mortgage recited in the deed, is a valuable consideration as against creditors: *Miles v. Miles*, 6 Or. 266.

*Onus* is on person attacking to prove fraud: *Kruse v. Prindle*, 8 Or. 158.

Assignment for benefit of creditors preferring unsecured creditor is not *prima facie* fraudulent: *Id.*

**Fraudulent Conveyances** (continued).

Fraud must have been participated in by grantor and grantee: *Id.*

Where the creditor's claim is only three dollars, equity will not set aside deed said to be fraudulent, at his suit: *Hamburger v. Grant*, 8 Or. 181.

Assignee for benefit of creditors has no power to set aside fraudulent conveyance made by assignor before assignment, but may resist lien claimed on goods in his hands: *Jacobs Bros. & Co. v. Ervin*, 9 Or. 52.

Complaint to set aside, need not allege insolvency or lack of other property, where it alleges execution returned unsatisfied: *Page & Co. v. Grant*, 9 Or. 116.

Where there is actual fraud, conveyance is void as to both existing and subsequent creditors: *Id.*

Lien by attachment without judgment or execution is sufficient to support a creditor's bill alleging fraud as a ground to set aside decree and sale thereunder: *Bremer & Co. v. Fleckenstein and Mayer*, 9 Or. 266.

Whatever was said by the parties to the sale at the time thereof, tending to show the character of the transaction, is admissible as evidence: *Bergman and Berry v. Twilight*, 10 Or. 337.

Execution creditor will not be restrained in equity from levying on whatever interest a fraudulent grantor may have: *Coolidge and McClaine v. Forward and Heneky*, 11 Or. 118.

Purchaser in good faith for valuable consideration of the property of an insolvent corporation does not take the property charged with the payment of the debts of the corporation: *Branson v. Oregon R'y Co.*, 11 Or. 161.

Where a valuable consideration has been paid, creditor seeking to set aside sale must prove that the grantee had actual notice of the fraud, but such notice may be inferred from the circumstances: *Coolidge and McClaine v. Forward and Heneky*, 11 Or. 327.

Person contracting for machinery, and before delivery conveying away his property, may be shown by the vendor to have made the conveyance with intent to defraud him: *Crawford v. Beard*, 12 Or. 447.

Subsequent creditor must show that the creation of the debt was contemplated, and the conveyance made with intent to defraud such creditor: *Id.*

**Fraudulent Conveyances** (continued).

Presumption of fraudulent intent from the effect on collection of debts owing by the grantor, and the result of placing his property beyond reach of process: *Id.*

Constructively fraudulent deed may be permitted to stand as security for actual consideration: *Id.*

To set aside a fraudulent general assignment for benefit of creditors at suit of a creditor, the creditor must have obtained a lien by judgment or otherwise: *Dawson v. Coffey*, 12 Or. 513.

Attaching creditor may levy on property fraudulently assigned, by taking it from the hands of the debtor, or by garnishment if in possession of assignee: *Id.*

Creditor may obtain judgment at law, and after exhausting the ordinary legal remedies, begin a creditor's suit in equity: *Id.*

Ordinarily, legal remedies must be exhausted before resorting to equity, in case of fraud under the insolvent law; otherwise, where a particular fund is set aside for a class of debts: *Id.*

Creditor, whose claim has been presented and allowed by assignee, may resort to equity to prevent fraudulent misapplication of the funds: *Id.*

Usually suit to reach equitable assets cannot be maintained until means at law have been exhausted: *Multnomah St. R'y Co. v. Harris*, 13 Or. 198.

But where the debtor has fraudulently encumbered or clouded the title of real property, a judgment creditor may proceed at once in equity to have the conveyance set aside: *Id.*

Merely taking deed, absolute in form, intended as a mortgage, where there is no concealment as to the character of the transaction, is not ground for impeachment: *Haseltine v. Espey*, 13 Or. 301.

Recording such instrument is sufficient notice of grantee's claim; *semble*, it could not be recorded as a mortgage: *Id.*

The evidence considered and held not to prove intent to defraud creditors: *Holladay v. Holladay*, 13 Or. 523.

Conveyance of whole estate to brother on payment of an alleged debt, by one deeply indebted elsewhere, is suspicious, and the grantor should establish by clear proof the consideration: *Marks & Co. v. Crow*, 14 Or. 382.



**Fraudulent Conveyances** (continued).

In such case, existing and subsequent creditors alike may have relief: *Id.*

The lien created by attachment is sufficient upon which to base suit in equity in the nature of a creditor's suit to set aside fraudulent conveyances and encumbrances: *Dawson v. Sims*, 14 Or. 561.

Attaching creditor is entitled to injunction to prevent foreclosure by wife of a fraudulent chattel mortgage on the goods of husband: *Meacham Arms Co. v. Swarts*, 2 W. T. 412.

After such creditor obtains judgment, he may file supplemental bill in the injunction suit, showing that fact: *Id.*

**Gaming.** See *Wagers*.

Pack of cards is a "gambling device" within the statute: *Frisbie v. State*, 1 Or. 264.

The terms "suffering such gambling device to be set up and used" are proper to charge offense: *Id.*

Betting on a game of cards not gambling within the statute: *Remington v. State*, 1 Or. 281.

Game of poker not a "gambling device" within the statute: *State v. Mann*, 2 Or. 238.

Said statute is void for not enumerating and describing the devices prohibited: *Id.*

Dealing, playing, and carrying on faro may be alleged conjunctively as one offense under the act of 1876 (c. 45, *Hill's A. L.*): *State v. Carr*, 6 Or. 133.

Indictment need not describe the manner of playing; the statutory language to charge the offense is sufficient: *Id.*; *Schilling v. Territory*, 2 W. T. 283.

Proceeding by indictment is an "action at law" to recover fines, within the act: *Id.*

Indictment need not name the game or the device by which it is played: *State v. Gitt Lee*, 6 Or. 425.

Must describe the device, and allege that it was adapted and used for playing games, etc.: *Id.*

Statute of 1876 (c. 45, *Hill's A. L.*) is sufficiently definite; it need not name the game or device: *Id.*

A section of said statute, giving double damages to person losing, is remedial, not penal or criminal, and the action to recover the damages is a civil action: *O'Keefe v. Weber*, 14 Or. 55.

**Gaming (continued).**

Said act is not unconstitutional as embracing subjects not expressed in the title, and the title expresses but one subject: *Id.*

Though containing both criminal and civil remedies, the object of each is to "punish and prevent gambling" as expressed in the title: *Id.*

**Game Laws.**

Act of 1880 to protect salmon does not apply to the Columbia River: *State v. Sturgess*, 9 Or. 537; S. C., 10 Or. 58.

Game law, extending to but five counties, does not contravene the Organic Act, which forbids granting of special privileges: *Hayes v. Territory*, 2 W. T. 286.

**Garnishment.**

A judgment debtor cannot be garnished by creditors of the judgment creditor: *Norton v. Winter and Lattimer*, 1 Or. 47; *Despain v. Crow*, 14 Or. 404.

Earnings of a judgment debtor, paid in by garnishee voluntarily, though exempt, need not be ordered repaid to debtor by justice: *Opitz v. Winn*, 3 Or. 9.

Appeal by garnishee after paying judgment under protest does not relieve sheriff from his duty to apply the money to satisfaction thereof: *Dufernoy v. Stitzel*, 3 Or. 58.

Defendant in action by husband and wife on wife's note, being garnished by creditors of husband who claim the note is his, may file bill of interpleader: *Fahie v. Lindsay*, 8 Or. 474.

Right of garnishee to enjoin on account of defects in the proceedings against defendant: *Ladd and Bush v. Ramsby*, 10 Or. 207.

Garnishment acts only upon existing legal rights of defendant that could be enforced by him in an action at law in his own name: *O. R. & N. Co. v. Gates*, 10 Or. 514; *Baker and Smith v. Eglin*, 11 Or. 333.

Where without negligence the garnishee answers that he owes defendant, and subsequent to judgment he ascertains that he was mistaken, he is entitled to relief in equity: *Id.*

Mortgagee's interest in chattels before foreclosure is not subject to garnishment: *Knowles v. Herbert*, 11 Or. 54; S. C., 11 Or. 240.

A corporation which is a stockholder holding property of

**Garnishment** (continued).

another corporation, not dividends, may be garnished on judgment against the latter company: *Hughes v. Or. R'y Co.*, 11 Or. 158.

Attaching creditors, as against garnishee, acquire the rights of the debtor, and no more: *Baker and Smith v. Eglin*, 11 Or. 333.

One for a valuable consideration agreeing to pay certain debts of another cannot be garnished at suit of other creditors of the latter: *Id.*

Proceedings supplemental to execution against garnishee are proceedings at law, and notice of appeal must allege errors sought to be reviewed on appeal: *Williams v. Gallick*, 11 Or. 337.

The order to appear and answer under oath must be served personally, and not on an attorney, but appearance of the garnishee at the hearing is equivalent to personal service: *Carter, Rice, & Co. v. Koshland*, 12 Or. 492.

Delivery by the officer of a copy of the writ to the garnishee, and a notice not specifying the identical property, but all debts, property, etc., in general language, is a valid garnishment: *Id.*

Upon taking a judgment in the attachment suit ordering sale of the property attached, pursuant to act of 1878 (sec. 157, *Hill's A. L.*), there can be no further subsequent judgment against the garnishee: *Id.* See *S. C.*, 13 Or. 615.

After judgment in the attachment suit, garnishee proceedings are merely a means of discovery: *Id.*

Property in the hands of an executor in his representative capacity is in custody of law, and is not subject to garnishment: *Harrington v. La Rocque*, 13 Or. 344.

But after order of distribution has been made, it is not in custody of law, and may be garnished: *Id.*

After entering judgment against the debtor, if garnishee proceedings are pending, and afterward are fully determined against the garnishee, a judgment against the garnishee may be entered: *Carter, Rice, & Co. v. Koshland*, 13 Or. 615.

Such judgment shall be for the value of the property to the extent of the judgment and costs: *Id.*

**Garnishment** (continued).

The form of such judgment not being directly provided for by statute, the courts have power under the Code to adopt a suitable mode: *Id.*

Property garnished is in custody of the law, and cannot be disposed of by the garnishee: *Id.*

Examination of garnishee is not an adversary proceeding, but is simply a means of discovery: *Coombs v. Davis*, 2 W. T. 466.

Judge, in such proceedings, cannot order garnishee to turn over property, unless he admits he has property of defendant in his possession: *Id.*

If garnishee claim a lien, he can only be ordered to turn over the property on his lien being first satisfied: *Id.*

But *semble*, otherwise with certain classes of property, making provision, however, for satisfaction of garnishee's lien: *Id.*

**Gold Coin.** See Money.

**Governor.** See Pardon.

Power of appointment to vacant office: *Cline and Newsome v. Greenwood and Smith*, 10 Or. 230.

Governor having resigned, secretary of state discharging the duties of the office as provided by the constitution, and also the duties of secretary, is entitled to the salary as governor: *Chadwick v. Earhart*, 11 Or. 389.

In such case, on the secretary's term of office expiring, he is still acting governor, and entitled to the salary as such: *Id.*

**Grain.** See Warehousemen.

**Grand Jury.** See Jury and Jury Trial.

**Grants.** See Deeds; Public Lands.

**Guaranty.** See Bills and Notes.

When and how the effect of a guaranty must be averred: *Goodwin v. Barnhart*, 1 Or. 215.

Undertaking of guarantors to guarantee the performance of a contract by another, and to indemnify against loss, construed: *Hildebrand v. Bloodsworth*, 12 Or. 75.

The consideration for contract need not be a benefit to guarantor: *Id.*

Answer charging fraud and misrepresentation and want of consideration as a defense to a suit on a contract of guaranty, held not to state facts sufficient to constitute a defense in law: *Marx v. Schwartz*, 14 Or. 177.



**Guaranty (continued).**

Instruction that if the debt was the debt of the defendant, then the plaintiffs are not entitled to recover in such suit, was held to be outside of the issues, and erroneous: *Id.*

Creditor collecting, upon execution against the principal debtor, part of the debt guaranteed, such amount collected is *pro tanto* satisfaction of the guaranty: *Id.*

Contract of guaranty renders the principal and guarantor severally liable, and they cannot be joined in one suit: *Tyler v. T. of T. A. & P. U.*, 14 Or. 485.

**Guardian and Ward.**

Guardian may mortgage minor's estate under subdivision 6, section 869, of the Code (sec. 895, Hill's A. L.): *Trutch v. Bunnell*, 5 Or. 504; *S. C.*, *contra*, 11 Or. 58.

In foreclosure, no defense that guardian's name as such was signed to the note and mortgage, and not the minor's: *Id.*

Minors not adversary parties to guardian in County Court in obtaining leave to mortgage: *Id.*

Guardian *ad litem* can confess judgment for infant: *English v. Savage*, 5 Or. 518.

Minor, on arriving at age, receiving proceeds from guardian's sale on partition is presumed to ratify the sale, and is estopped to deny its validity: *Hatcher v. Briggs*, 6 Or. 31; *Brazee v. Schofield*, 2 W. T. 209.

County Court in the matter of appointing guardians for minors and lunatics is a court of general and superior jurisdiction: *Monastes v. Catlin*, 6 Or. 119.

Such jurisdiction is probate jurisdiction within article 7, section 12, of the constitution: *Id.*

General guardian has power to appear and answer for his ward, and his appearance is a waiver of irregularity in service of summons: *Ankeny v. Blackiston*, 7 Or. 407.

Mother of a bastard is its guardian, and is bound to maintain it: *Nine v. Starr*, 8 Or. 49.

Ward, or those claiming under him, cannot, by statute, in contesting the validity of sale of real property, collaterally attack the appointment of the guardian: *Walker v. Goldsmith*, 14 Or. 125.

Where the question as to guardian's sale arises collaterally, and the pleadings raise no question of jurisdiction,

**Guardian and Ward** (continued).

and the proceedings are regular on their face, sale must be sustained: *Id.*

Guardian's petition for sale of land, which states one sufficient ground, will sustain jurisdiction to order the sale, though it also states another insufficient ground: *Id.*

Proof of posting notice of sale dated prior to date of posting, clerical error presumed, where the record otherwise shows the fact: *Id.*

Notice of sale need not be published the four weeks immediately preceding the sale; sufficient if it be published four weeks successively prior to the sale: *Id.*

Fraudulent sale can be attacked only by direct allegations in the pleadings: *Id.*

Acquiescence by minor for unreasonable time after reaching his majority is a waiver of his right to attack for fraud: *Id.*

Partition proceedings, though beyond the jurisdiction of a probate court, are binding upon adults and minors appearing by guardian under supervision and sanction of the Probate Court: *Brazee v. Schofield*, 2 W. T. 209.

If guardian acts under judicial authority, though irregularly, his acts are valid on collateral attack: *Id.*

Ward is deemed to have ratified void sale of his property, if after attaining full age he does not within reasonable time disaffirm it: *Id.*

Guardian's sale will not be held void on collateral attack, though the description was indefinite and notice was published three instead of four weeks, where the record sufficiently shows that the Probate Court was applied to upon a definite matter within its jurisdiction: *Id.*

Ward having, after coming of age, acquiesced by silence for years, during which improvements were made, cannot attack such sale: *Id.*

**Habeas Corpus.**

Jurisdiction is generally original, but in a sense appellate, in Circuit Court: *Norman v. Zieber*, 3 Or. 197.

Jurisdiction of committing magistrate may be put in issue on return of writ: *Id.*

Rehearing of the evidence not a matter of course, where prisoner was held to bail: *Fleming v. Bills*, 3 Or. 286.

Informality in commitment will not justify discharge,

**Habeas Corpus** (continued).

where petitioner does not produce record, though in his power to do so: *Id.*

Auxiliary writ of review being granted, court refused to rehear the evidence given before the committing magistrate: *Id.*

An order of commitment of court of competent jurisdiction not void for error of fact or law: *Id.*

Questions properly triable arise on the return, and the traverse thereto: *Merriman v. Morgan*, 7 Or. 68.

Irregularities not apparent in the process, unless jurisdictional, will not be inquired into: *Id.*

The return is a pleading, and is to be construed and have effect as in an action: *Pomeroy v. Lappeus*, 9 Or. 365.

Jurisdiction is acquired by the service of the writ: *Id.*

Admitting the prisoner to bail after service of the writ does not oust jurisdiction, and an answer or return alleging such fact is demurrable: *Id.*

Trial of a cause by a court of competent jurisdiction is not reviewable on writ of *habeas corpus*: *Ex parte Williams*, 1 W. T. 240.

**Handwriting.** See Evidence.

**Hearsay.** See Evidence.

**Heirs.** See Administration; Legacies; Public Lands; Wills.

Take title of realty at once on death of ancestor; rights of County Court over: *Hanner v. Silver*, 2 Or. 336.

Heirs of settler under donation law, who dies before proving, take by purchase, not by descent: *Delay v. Chapman*, 3 Or. 459.

The liability of the estate acquired, to administration and debts of deceased: *Id.*

Infant heir necessary party under act of 1855 on sale of realty of decedent: *Fiske v. Kellogg*, 3 Or. 503.

Heirs of unnaturalized person dying before patent under donation law inherit the claim: *Blakesly v. Caywood*, 4 Or. 279.

Take no title by the patent to donation claim, conveyed by man and wife before patent: *Dolph v. Barney*, 5 Or. 191.

Are necessary parties defendant in foreclosure suit against executors: *Renshaw v. Taylor*, 7 Or. 315.

Tender by heir to pay claim against estate; effect on al-

**Heirs (continued).**

lowance of order to sell real property of estate to pay such claim: *Weill v. Clark's Estate*, 9 Or. 387.

**Highways.** See Dedication; Bridges; Ferries.

The recorded plat of a highway is not evidence of the existence of the road, but of its location only: *Naylor v. Beeks*, 1 Or. 216.

Such plat necessary under act of 1854, before opening of the road, unless the road is laid upon a government survey: *Id.*

*Certiorari* lies to bring up proceedings of County Court in laying out highway: *Thompson v. Multnomah County*, 2 Or. 34.

Petition of twelve householders and legal notice are jurisdictional in laying out: *Id.*; *Johns v. Marion County*, 4 Or. 46.

Person who signed petition is not "disinterested" householder, and therefore incompetent to act as a viewer: *Id.*

Ferry landings in the line of highway are a part of the highway: *Mills v. Learn*, 2 Or. 215; *Montgomery v. Multnomah R'y Co.*, 11 Or. 344; *S. C.*, 12 Or. 25.

County liable for negligence of road supervisor: *McCalla v. Multnomah County*, 3 Or. 424.

Petition and notice necessary to give County Court jurisdiction to lay out: *Johns v. Marion County*, 14 Or. 46.

Petition must describe terminal points with certainty: *Id.*

Record of County Court must show jurisdiction affirmatively: *State v. Officer*, 4 Or. 180.

Not sufficient to recite posting of notice to satisfaction of of court; must state the facts: *Id.*

Statute authorizing establishment of private road over land of another without consent, void: *Witham v. Osburn*, 4 Or. 318.

A person who repairs a county bridge or highway without legal authority has no right to compensation: *Springfield Milling Co. v. Lane County*, 5 Or. 265.

Power of county to lay out a highway over road owned by private company: *C. & G. Road Co. v. Douglas County*, 5 Or. 280.

Corporation cannot appropriate highway established by dedication, without first attempting to agree with the



**Highways (continued).**

County Court in relation thereto: Douglas County Road Co. v. Abraham, 5 Or. 318.

A slight change in the thread of the road will not defeat the rights of the public: Id.

Paramount control of streets in city and country roads is in legislature: East Portland v. Multnomah County, 6 Or. 62; Multnomah County v. Sliker, 10 Or. 65.

Legislature may transfer its control of streets and highways in a city to the municipality: Id.

Order denying petition to lay out road does not bar subsequent proceedings to establish a road over same route: Kamer v. Clatsop Co., 6 Or. 238.

Unmarried men may be householders within road law: Id.

Value of the land and damages or benefit by reason of the opening of the road, the measure of damages: Terwilliger v. Multnomah Co., 6 Or. 295; Putnam v. Douglas Co., 6 Or. 328.

The value of the roadway, extra fences, inconveniences, or advantage, are to be estimated: Putnam v. Douglas Co., 6 Or. 328.

The advantages may exceed or equal the damage, when the jury will find against the claimant: Id.

Taking private property for public use for roads, without awarding damages before deducting benefits, is constitutional: Id.

Damages may be obtained by person specially injured by toll-gate obstructing the road: Milarkey v. Foster, 6 Or. 378.

What complaint in such action is sufficient on demurrer: Id.

Oral evidence is admissible to show the number of buildings and inhabitants at a place to prove it a town within the statute, prohibiting toll-gates within the limits of a town: Id.

Act of Congress for the construction of the Dalles Military Road; duty of company building road: Schultz v. Military Road Co., 7 Or. 259.

Building the road of less width than prescribed will render company liable to person injured: Id.

Such person can recover, as carrier of United States mails,

**Highways (continued).**

for tolls paid on other roads, when compelled on account of want of bridges to travel such other road: *Id.*

Mail-carriers, and those in their employ, are exempt from tolls on the Dalles Military Road: *Id.*

Private corporation may locate its road part of the way over a county road by making agreement, under the statute, with County Court: *D. C. R. Co. v. C. & G. R. Co.*, 8 Or. 102.

When such company has made such agreement, it may so locate its road, though another company, without such agreement, has already appropriated the county road: *Id.*

Road supervisor is sole judge of the necessity for taking materials from lands adjoining or near the road, for repairs: *Kendall v. Post*, 8 Or. 141.

Equity will not interfere, where he does not oppress, in the discharge of such duties: *Id.*

Party from whose land such material is taken has his remedy by applying to the County Court to assess the damage: *Id.*

The statute, section 29, chapter 50, Miscellaneous Laws (sec. 4093, Hill's A. L.), affording such remedy, is not unconstitutional for assessing without jury trial: *Id.*

Private corporation, locating its road in part over a highway, acquires no exclusive right thereto: *C. & G. Road Co. v. Stephenson*, 8 Or. 263.

The part of the highway so located need not be resurveyed as a part of the private road: *Id.*

By locating on such highway, the corporation does not acquire the right to exclude another corporation, subsequently formed, from appropriating and using the same in like manner: *Id.*

Act providing for construction of a wagon road, held not a local or special law obnoxious to article 4, section 23, subdivision 7, of the constitution: *Allen v. Hirsch*, 8 Or. 412.

Notice of application for laying out a highway must be signed by the petitioners: *Minard v. Douglas Co.*, 9 Or. 206; *King v. Benton County*, 10 Or. 512.

Proof of posting notices should show the places where posted: *Id.*

**Highways (continued).**

County Court has no power to confer the right on a private corporation to establish a toll-gate and collect toll on a public highway, at a point not embraced in the line of its corporate road: *State v. Douglas County Road Co.*, 10 Or. 185.

The private corporation, obtaining agreement with the County Court to use such highway, must, on accepting, actually appropriate and establish their road thereon: *Id.*

Petitioners not signing notice have no standing in court, and their petition confers no jurisdiction: *King v. Benton County*, 10 Or. 512.

Statute providing for proceedings to be done at "next ensuing" term of County Court means the regular not special appointed term: *Tompkins, Clackamas County*, 11 Or. 364.

Term having been irregularly appointed, and road established thereat, the court cannot, by *nunc pro tunc* order, validate the proceedings at subsequent term: *Id.*

Indictment for obstructing, when *termini* must be alleged and proved: *State v. Hume*, 12 Or. 133.

When equity will restrain obstructing highway: *Luhrs v. Sturtevant*, 10 Or. 170; *Smith v. Gardner*, 12 Or. 221; *Walts v. Foster*, 12 Or. 247.

In action for injury sustained in falling from an unguarded elevated plank road, plaintiff need not plead or prove want of contributory negligence: *Grant v. Baker*, 12 Or. 329.

Merely transferring, by the legislature, the control over a county road to a city does not make it a street: *Heiple v. East Portland*, 13 Or. 97.

Road is a public highway; street is a road in a city or village: *Id.*

Use and improvement of a road within city limits of a city is not sufficient to prove acquiescence of abutting owners to the use thereof as a street, under plea of statute of limitations: *Id.*

Legislature has authority to establish road from Olympia to Monticello, and require counties through which it passes to pay the expense in proportion to the miles in each: *Lewis County v. Hays and Kennedy*, 1 W. T. 109.

**Highways (continued).**

The fact that such road is called territorial instead of county road is not material: *Id.*

Under act of 1867, no appeal lies from commissioners in opening or laying out road except on the question of amount of damages: *King County v. Neely*, 1 W. T. 241.

**Homesteads.** See Public Lands.**Homicide.** See Criminal Law; Evidence.

Instructions on self-defense held erroneous: *Goodall v. State*, 1 Or. 333.

Killing, being admitted by prisoner, does not devolve on him the necessity of proving justification: *State v. Whitney*, 7 Or. 386.

If one defendant strikes the blow, the other being present assisting him, both may be found guilty of manslaughter under same indictment: *State v. Fitzhugh*, 2 Or. 227.

Malice presumed from voluntary use of weapon intended for taking life: *State v. Bertrand*, 3 Or. 61.

After proof of use of such weapon, excuse and justification is defense, and burden is on defendant: *State v. Connally*, 3 Or. 69.

And it is not ground for acquittal that evidence fails to show whether or not justifiable: *Id.*

Burden of proof on the defendant to show justification by preponderance of proof: *Id.*

May use necessary force to prevent forcible entry into defendant's house, but not follow and shoot: *Id.*

Self-defense does not justify following and killing after danger has ceased: *Id.*

Reasonable doubt in homicide case: *State v. Glass*, 5 Or. 73; *State v. Ah Lee*, 7 Or. 237; *State v. Anderson*, 10 Or. 448; *State v. Abrams*, 11 Or. 169; *Smith v. United States*, 1 W. T. 262; *Leonard v. Territory*, 2 W. T. 381.

The form of indictment referred to in section 71 of the Criminal Code (sec. 1270, Hill's A. L.) is sufficient: *State v. Dodson*, 4 Or. 64; *Smith v. Smith*, 5 Or. 186; *State v. Wintzingerode*, 9 Or. 153.

Evidence of threats of deceased as proving killing justifiable: *Id.*

Evidence of previous attempt of deceased to commit abortion on herself, unless contributing to her death, not



**Homicide (continued).**

admissible in manslaughter by attempt to commit abortion: *State v. Glass*, 5 Or. 73.

Where the wound is the immediate cause of the death, no defense that deceased might have recovered if greater skill were used in his treatment: *State v. Garrand*, 5 Or. 156.

On trial for murder, if there is no conflict of evidence on the point, court may instruct the jury that there is no evidence reducing the crime to manslaughter: *State v. Garrand*, 5 Or. 216; *State v. Whitney*, 7 Or. 386; *Smith v. United States*, 1 W. T. 262.

Murder in the first degree defined; what deliberation necessary to constitute: *State v. Ah Lee*, 8 Or. 214; *State v. Anderson*, 10 Or. 448; *State v. Abrams*, 11 Or. 169; *State v. Murray*, 11 Or. 413; *Leonard v. Territory*, 2 W. T. 381.

Homicide in committing robbery; the purpose to kill is conclusively presumed: *State v. Brown*, 7 Or. 186.

In such case the indictment need not allege that the killing was done purposely: *Id.*

Indictment in the form set forth in the appendix to the Code sufficient: *Id.*

The killing is murder in the first degree if done at any time before the taking and carrying away of the goods is completed: *Id.*

The defendant was not prejudiced by an erroneous instruction to the effect that if the killing took place after the robbery was completed, the defendant should be acquitted: *Id.*

One shooting at a person with intent to kill him, and missing him and killing another, is as guilty as though he had killed the person at whom he fired: *State v. Johnson*, 7 Or. 210; *State v. Murray*, 11 Or. 413.

Where the evidence of premeditation is conflicting, it is error to instruct that there is no evidence to reduce the crime from murder in the first degree: *State v. Ah Lee*, 7 Or. 237.

Admission of the killing does not admit that it was murder; instructions assuming such to be the case are erroneous: *State v. Whitney*, 7 Or. 386; *State v. Grant*, 7 Or. 414; *State v. Mackey*, 12 Or. 154.

**Homicide (continued).**

- Where the facts do not raise a conclusive presumption of murder in the first degree, the degree of the guilt must be left to the jury; instruction held erroneous: *State v. Grant*, 7 Or. 414.
- View of premises by the jury; no error to fail to provide for presence of defendant or his counsel when not requested: *State v. Ah Lee*, 8 Or. 214.
- Direct proof of deliberation and premeditation unnecessary; may be inferred: *State v. Anderson*, 10 Or. 448.
- General indictment stating facts constituting crime of murder in first degree will sustain verdict of guilty in either degree, and the verdict must state the degree: *State v. Wintzingerode*, 9 Or. 153.
- Evidence that defendant shortly before the killing procured two guns, which were afterwards found secreted under his bed, admissible: *Id.*
- That he had money the day after the killing, of the kind owned by deceased, and which defendant did not have before, admissible: *Id.*
- Threats of accused as proving malice: *State v. Powers*, 10 Or. 145.
- General language in a charge, used by way of illustration and afterwards limited and applied to case at bar, is not error: *State v. Anderson*, 10 Or. 448.
- Court having given definition of reasonable doubt need not give another at request of defendant: *Id.*
- Deliberation and intention may be presumed from the circumstances: *Id.*
- Capital punishment is not contrary to article 1, section 15, of the constitution: *Id.*
- "By then and there unlawfully and feloniously shooting him," held surplusage in indictment for first degree: *State v. Abrams*, 11 Or. 169.
- Deliberate use of deadly weapon defined: *Id.*
- When negligence causing death is manslaughter: *State v. Justus*, 11 Or. 178.
- Insanity as a defense to homicide: *State v. Murray*, 11 Or. 413; *McAllister v. Territory*, 1 W. T. 360.
- Deliberately and with premeditation lying in wait, and shooting to kill one person, and missing him but killing another, is murder in the first degree: *State v. Murray*, 11 Or. 413.

**Homicide (continued).**

Admission of the fact of killing by gunshot does not admit that it was done by defendant; instruction assuming the fact as proved is error: *State v. Mackey*, 12 Or. 154.

Proof that accused obtained a gun at a distant point, and was seen at several places carrying it toward the place of murder, is not rebutted by proof that at one place on the way he was seen without it: *State v. O'Neil*, 13 Or. 183.

Where life is involved, latitude in admission of evidence in defense should be given: *Id.*; *State v. Mah Jim*, 13 Or. 235.

Indictment charging murder at common law is sufficient to sustain a verdict of murder in the first degree under the statutes: *Leschi v. Territory*, 1 W. T. 13.

The peculiar circumstances distinguishing murder in the first degree under the statute need not be set out in the indictment: *Id.*

The jury are to determine from the evidence the degree: *Id.*

Verdict of "guilty as charged, and that he suffer death," is sufficient verdict for murder in the first degree: *Id.*

Arraignment cannot be waived on a charge of murder: *Elick v. Territory*, 1 W. T. 136.

Consent of counsel to enter plea of "not guilty" will not dispense with arraignment, and prisoner must personally enter his plea, unless shown to be incapacitated: *Id.*

One unacquainted with English language is entitled to have interpreter, who shall make known the charge, receive his plea, and as trial proceeds, interpret the evidence to him: *Id.*

Homicide on Indian reservation is within federal jurisdiction, and the common law governs: *Shapoonmash v. United States*, 1 W. T. 188.

In capital cases, no presumption in favor of the regularity of the proceedings: *Id.*

Murder committed on tide-water, within the boundaries of a county, is within the admiralty jurisdiction of the United States: *Smith v. United States*, 1 W. T. 262.

Territorial courts would have concurrent jurisdiction of such offense: *Id.*

**Homicide (continued).**

Evidence of dangerous character of the deceased not admissible where there is no evidence of assault or threatened assault on his part: *Id.*

Judge withheld instructions on manslaughter, telling the jury that if, having deliberated, they wanted instructions on that subject, he would give them; held, no error: *Id.*

There being no evidence to reduce the crime to manslaughter, it is not error to refuse to instruct on that subject: *Id.*

Whether the deceased was or was not an American citizen, or whether or not the vessel was American, is immaterial upon the question of the jurisdiction of the United States admiralty courts: *Id.*

Jurisdiction of territorial courts over person of one accused of murder on San Juan Island during the joint occupancy under convention between the United States and Great Britain: *Watts v. United States*, 1 W. T. 288; *Watts v. Territory*, 1 W. T. 409.

Not error to instruct that where a third person interferes between two combatants, without reasonable notice, to prevent one of the latter from killing the other, and is killed, such killing is not murder in the first degree: *McAllister v. Territory*, 1 W. T. 360.

Not error to instruct in such case that the crime is no more than manslaughter: *Id.*

Omission of the word "feloniously" is not material if the indictment follows the statute: *Watts v. Territory*, 1 W. T. 409.

Instructions as to appearances of danger that justify the taking of life approved: *Id.*

Not necessary that the records show a copy of indictment was served on the prisoner: *Lytle v. Territory*, 1 W. T. 435; *Leonard v. Territory*, 2 W. T. 381.

Not necessary where there is no evidence of self-defense, to qualify instructions so as to meet case of accident or self-defense: *Doctor Jack v. Territory*, 2 W. T. 101.

Deliberate and premeditated malice must be charged directly of the killing, and applying the words to the assault and the shooting is not sufficient in the indictment: *Leonard v. Territory*, 2 W. T. 381.



**Homicide (continued).**

Recital in the conclusion of the indictment of such words as applied to the killing, do not supply the omission to directly so charge: *Id.*

Defendant, against whom the evidence is circumstantial, may show that at the time of the killing another person hostile to the deceased was in the neighborhood, and had threatened to kill deceased: *Id.*

Instructions as to duty of accused to disprove facts brought out against him, and inference to be drawn from his failure to do so if jury believe it was within his power to disprove them, held erroneous: *Id.*

Form of indictment for murder in first degree given: *Id.*

**Horse Races.** See Wagers.**Householders.**

Signer of petition for highway is not a "disinterested" householder, and is incompetent to act as a viewer: *Thompson v. Multnomah Co.*, 2 Or. 34.

Petition of twelve householders and notice are jurisdictional in proceedings in the County Court to lay out a highway: *Id.*; *Johns v. Marion Co.*, 4 Or. 46.

Unmarried man may be householder under the road law: *Kamer v. Clatsop Co.*, 6 Or. 238.

In Washington Territory, husband and wife jointly constitute the head of the family, and wife, as well as husband, is householder: *Rosencrantz v. Territory*, 2 W. T. 267.

**Hurdy-gurdy Houses.**

House kept for public dancing simply is not a "hurdy-gurdy dance-house," within the statute: *State v. Tilley*, 9 Or. 125.

**Husband and Wife.** See Curtesy; Deeds; Divorce; Dower; Estoppel; Fraud and Deceit; Fraudulent Conveyances; Marriage; Public Lands.

## 1. RELATION AND STATUS.

## 2. ACTIONS AND SUITS.

## 2. PROPERTY RIGHTS.

## 1. RELATION AND STATUS.

Though receiving a part of the money from a foreclosure sale of her separate property, upon the husband's mortgage thereon, in suit against the husband, the wife is deemed his agent merely, and is not estopped: *Fahie v. Pressey*, 2 Or. 23.

**Husband and Wife (continued).**

Cannot contract with each other, notwithstanding article 15, section 5, of the constitution: *Pittman v. Pittman*, 4 Or. 298; *Elfelt v. Hinch*, 5 Or. 255.

Voluntary conveyance by husband to wife presumed fraudulent as to existing creditors: *Id.*

On marriage, debts owing the husband by the wife are canceled, and he becomes liable for such other debts of hers as are pressed upon him during coverture, but not for those not so pressed, though he received a fortune by his wife: *Gilmore v. Gilmore*, 7 Or. 374.

Married woman's note is not absolutely void, but the burden is on the party setting it up to show that it was made within her powers to contract: *Wells v. Applegate*, 10 Or. 519.

In 1864, in Oregon, husband and wife could not contract with each other, except with reference to wife's separate property: *Lawrence v. Lawrence*, 14 Or. 77.

Wife conducting business in her own name may employ husband, and such employment is not a fraud on husband's creditors, and does not subject her property to his debts: *King v. Voos*, 14 Or. 91.

So, though husband's services be voluntary: *Id.*

But such arrangement is to be regarded with suspicion: *Id.*

Rights and *status* of married women at common law reviewed: *Phelps v. Steamship City of Panama*, 1 W. T. 518.

Woman's right to contract for safe carriage of her person by common carrier is the same whether she be married or single: *Id.*

Married women, residing with their husbands, are competent grand jurors in Washington Territory: *Rosenkrantz v. Territory*, 2 W. T. 267; *Schilling v. Territory*, 2 W. T. 283; *Hayes v. Territory*, 2 W. T. 286.

Chapter 183 of Code 1881 removed common-law disabilities of wife: *Id.*

Under the statute, husband and wife are jointly the head of the family, and wife is householder as well as the husband: *Id.*

Constitution of grand jury is not impaired by making married women members thereof: *Id.*

**Husband and Wife** (continued).**2. ACTIONS AND SUITS.**

Title being in the wife, she is a necessary party to foreclosure suit: *Fahie v. Pressey*, 2 Or. 23.

When wife is sued alone, how far coverture is to be pleaded in bar or abatement: *Kennard v. Sax*, 3 Or. 263.

Specific performance of contract made by husband and wife to convey wife's land not granted during coverture: *Frarey v. Wheeler*, 4 Or. 190.

But where party went into possession and improved, value of improvements are made a charge on land: *Id.*

Divorced wife cannot sue at law against former husband on contract implied, arising during coverture: *Pittman v. Pittman*, 4 Or. 298.

Husband and wife must be joined as defendants in suit concerning her property: *Hass v. Sedlak*, 9 Or. 462.

Wife is liable for goods furnished for family use, under act of 1878, though sold on husband's credit: *Watkins v. Mason*, 11 Or. 72; *Phipps v. Kelly*, 12 Or. 213.

But complaint must allege that the goods were sold for family use, and the wife cannot be held liable in a simple action for goods sold and delivered, when they were sold on the order of the husband: *Smith v. Sherwin*, 11 Or. 269.

Wife may be sued, jointly or separately, for goods sold for family use, and separate judgment rendered against her: *Watkins v. Mason*, 11 Or. 72; *Phipps v. Kelly*, 12 Or. 213.

Equity jurisdiction over wife's separate property is not ousted by the act of 1878 (sec. 2874, Hill's A. L.), providing for holding her personally liable in an action at law for family expenses: *Phipps v. Kelly*, 12 Or. 213.

Right of husband to join with wife in libel in admiralty *in rem*, for injuries to her person received on ship: *Phelps v. Steamship City of Panama*, 1 W. T. 518.

Wife attempting to foreclose a fraudulent mortgage on husband's property may be enjoined at suit of attaching creditor: *Meacham Arms Co. v. Swarts*, 2 W. T. 412.

**3. PROPERTY RIGHTS.**

Married woman is estopped by the recitals in her deed: *Graham v. Meek*, 1 Or. 325.

**Husband and Wife** (continued).

- Title being in wife, she is necessary party to foreclosure suit: *Fahie v. Pressey*, 2 Or. 23.
- Not estopped to claim, though silent during foreclosure of husband's mortgage thereon: *Id.*
- Is not estopped by husband's deed to claim after-acquired title in her: *Carter v. Chapman*, 2 Or. 93.
- May sell or exchange separate property, and the money or property received is separate property: *Brummet v. Weaver*, 2 Or. 168.
- Registration of separate property is not notice to stranger of any property not mentioned: *Id.*
- Property cannot be sold or exchanged, and consideration held under former registration: *Id.*
- Death of husband, or a divorce, operates as a revocation of registration: *Id.*
- The constitution article 15, section 5, changes the common law as to wife's separate property: *Id.*
- To charge separate estate for contract during coverture, debt must have been contracted for benefit of, or on the credit of, separate estate: *Kennard v. Sax*, 3 Or. 263.
- When separate estate is not registered as such, it is *prima facie* the property of husband: *Elfelt v. Hinch*, 5 Or. 255.
- Rights of husband and wife under donation law. See Public Lands.
- Property bought by husband with wife's money in his own name is held by him in trust for her: *Linnville v. Smith*, 6 Or. 202.
- Section 5, article 15, of the constitution, exempts from execution for husband's debts, lands of woman married before adoption of the constitution: *Rugh v. Ottenheimer*, 6 Or. 231.
- Mortgage of woman's separate property for husband's debts may be enforced: *Moore v. Fuller*, 6 Or. 272; *Gray v. Holland*, 9 Or. 512.
- To avoid such mortgage on the ground of fraud, she must show that the mortgagee participated: *Id.*
- Wife is entitled to own, hold, and control property earned by her after marriage, and husband cannot interfere with it: *Atterberry v. Atterberry*, 8 Or. 224.
- Wife residing out of the state may, by joining with her husband, execute a valid power of attorney to convey



**Husband and Wife** (continued).

her property in the state: *Moreland v. Brady*, 8 Or. 303.

Quitclaim by wife of dower, in husband's deed, does not estop her from claiming an existing or after-acquired fee-simple interest: *Burston v. Jackson*, 9 Or. 275.

Husband's interest in wife's separate property does not accrue until her death, and it is no fraud on his creditors to join her in her deed of conveyance on sale by her: *Besser v. Joyce*, 9 Or. 310.

Husband must be joined as defendant in suit to foreclose wife's mortgage: *Hass v. Sedlak*, 9 Or. 463.

Wife, mortgaging her property for husband's debt, holds as surety in regard thereto: *Gray v. Holland*, 9 Or. 512.

On marriage, at common law, wife's personalty, actually or constructively in her possession, becomes the property of husband, and so, also, the personalty which during coverture is reduced to his or her possession: *Cressy v. Tatom*, 9 Or. 541.

Land purchased in Oregon, in name of husband, with money obtained by the wife during coverture while they were residing in another state, belongs to the husband: *Id.*

In the absence of averment and proof, it is presumed that the common-law rule of property rights prevails in other states: *Id.*

Equity jurisdiction over wife's separate property is not ousted by the act of 1878 (sec. 2874, Hill's A. L.), providing for holding her personally liable in an action at law for family expense: *Phipps v. Kelly*, 12 Or. 213.

There is no resulting trust proved in favor of the wife, where, under an oral agreement that the title should be taken in the wife's name, the husband paid the purchase-money and for the improvements, and the family resided on the property: *Lawrence v. Lawrence*, 14 Or. 77.

Where husband and wife sell their donation claim, and husband invests the proceeds of both his and the wife's portion in other land, on which both reside for twenty years, husband holds an undivided half in trust for wife: *Springer v. Young*, 14 Or. 280.

Neglect of wife during coverture to establish her right by suit does not bar her claim: *Id.*

**Impaneling Jury.** See Jury and Jury Trial.

**Impeachment.** See Judgments and Decrees; Witnesses.

**Imprisonment.** See Arrest; Commitment; Criminal Law; False Imprisonment; Habeas Corpus.

**Improvements.** See Estoppel; Mortgages; Specific Performance.

**Indian Country.** See Indians.

**Indians.**

Oregon is "Indian country" within the purview of acts of Congress: *United States v. Tom*, 1 Or. 26.

Prohibition of sale, etc., of liquor to, in act of Congress of June 30, 1834, applicable to Oregon and Washington Territory: *Id.*; *Fowler v. United States*, 1 W. T. 3.

One who sells liquor to Indians may be punished under territorial act and act of Congress for the same offense: *State v. Coleman*, 1 Or. 191.

Indian agent may, under act of Congress, seize wagon and team engaged in transporting liquor through reservation, though the person in possession is not the owner: *Webb v. Nickerson*, 11 Or. 382.

Surrendering the property to the owner subsequently is not an admission that the seizure was wrongful: *Id.*

In justifying under the seizure, it is necessary to allege that the person in possession was a white person or an Indian: *Id.*

Washington Territory is Indian country within the meaning of the Indian intercourse act: *Nesqually Mill Co. v. Taylor*, 1 W. T. 1.

Act of Congress of March 3, 1847, regarding trade with Indians, does not repeal the act of June 30, 1834, but the second section adds the penalty of imprisonment: *Id.*

A fine under the act of 1834 can only be collected by suit: *Id.*

No evidence of general war among the Indians, affecting the case: *Yelm Jim v. Territory*, 1 W. T. 63.

Indian sustaining tribal relations is as capable of entering into contract as any other alien, excepting executory contracts for payment of money, or goods paid or furnished by the United States to any Indian tribe pursuant to stipulation or treaty: *Gho v. Julles*, 1 W. T. 325.

**Indians (continued).**

The right of Indian to contract draws after it liability to be sued: *Id.*

**Indictment.** See Criminal Law.

**Individual Liability of Stockholders.** See Corporations.

**Indorsement.** See Bills and Notes; Filing Papers.

**Infants.** See Divorce; Guardian and Ward; Parent and Child; Statute of Limitations.

Decree against infant by court having jurisdiction, without fraud, is as binding as against an adult: *English v. Savage*, 5 Or. 518.

Doctrine of parol demurrer is not recognized in Oregon: *Id.*

In action for assault and battery upon infant in the care of the defendant, his general conduct toward the infant is admissible to prove or rebut evidence of malice: *Smith v. Harris*, 7 Or. 76.

Putative father of bastard not liable on his naked promise to support: *Nine v. Starr*, 8 Or. 49.

Mother of such child is the guardian, and is bound to maintain it: *Id.*

**Information.** See Criminal Law; Quo Warranto.

**Infringement.** See Trade-mark.

**Injunctions.**

Individual may have injunction against public nuisance when specially and irreparably injured: *Parrish v. Stephens*, 1 Or. 73.

Dissolution acts as a technical breach of injunction bond: *Stone v. Cason*, 1 Or. 100.

The power to grant an injunction will not be exercised where there is remedy at law, not unless plaintiff has shown diligence: *Wells, Fargo, & Co. v. Wall*, 1 Or. 295.

Discretionary, in enjoining the erection of party-wall in this case, and here denied: *Burton v. Moffitt*, 3 Or. 29.

Where answer denies all equities in bill, injunction not granted: *Wellman v. Parker*, 3 Or. 253.

Not the proper remedy to require inferior court to complete its record: *State v. Church*, 5 Or. 373.

Not the proper remedy to test the validity of election determining location of county seat: *McWhirter v. Brainard*, 5 Or. 426.

**Injunctions (continued).**

Not granted where the rights of the plaintiff are doubtful: Taylor v. Welch, 6 Or. 198; Ladd and Bush v. Ramsby, 10 Or. 207; Tongue v. Gaston, 10 Or. 328; Wattier v. Miller, 11 Or. 329.

The threatened erection of wharves on the water front adjacent to plaintiff's land may be enjoined: Parker v. Taylor, 7 Or. 435.

Not granted to restrain road supervisor from taking material for repairing roads from lands near by, in the ordinary discharge of his duties: Kendall v. Post, 8 Or. 141.

Complaint must not only allege irreparable injury, but state the facts from which it is inferred: Portland v. Baker, 8 Or. 356.

Adjacent lot-owner may enjoin person threatening to grade down street and permanently injure his lot: Price v. Knott, 8 Or. 438.

When equity will enjoin a threatened trespass: Weiss v. Jackson Co., 9 Or. 470; Wattier v. Miller, 11 Or. 329; Smith v. Gardner, 12 Or. 221; Walts v. Foster, 12 Or. 247.

In the absence of malice and want of probable cause, a person injured by injunction must seek his remedy on the injunction bond: Ruble v. Coyote G. & S. M. Co., 10 Or. 39.

Such person must seek his remedy at law, and not in equity, in any event: Id.

Remedy may be had at law on the bond, though in terms joint, and the interest of the parties distinct: Id.

Right of garnishee to enjoin, for defects in proceedings against the defendant: Ladd and Bush v. Ramsby, 10 Or. 207.

Injunction not granted on alternative and doubtful averments: Id.

Injunction against overflow by dam not granted where plaintiff's right is doubtful: Tongue v. Gaston, 10 Or. 328.

Does not lie at suit of road supervisor to prevent person from illegally collecting and appropriating road taxes: Pettyjohn v. Parmenter, 10 Or. 341.

Granted to restrain judgment obtained by fraud against defendant having a good defense: Marsh v. Perrin, 10 Or. 364.



**Injunctions (continued).**

Granted at the suit of a riparian owner to restrain unlawful diversion of waters of Tualatin River: Shaw v. Oswego Iron Co., 10 Or. 371; Weiss v. Oregon Iron etc. Co., 13 Or. 496.

Merits of an injunction suit in Circuit Court, to restrain enforcement of a decision of Supreme Court, may be inquired of by the latter court on *mandamus*: State v. Jacobs, 11 Or. 314.

The issuing of the writ of *mandamus* is a conclusive determination of the invalidity of the injunction: Id.

Injunction for infringement of trade-mark, when allowed: Duniway Pub. Co. v. Northwest Printing Co., 11 Or. 322.

Owner of dam not entitled to injunction against one in possession of land overflowed thereby, who seeks to drain the land, without showing an easement in himself to overflow such land: Wattier v. Miller, 11 Or. 329.

Injunction may be granted to restrain sale on execution on a judgment when the result would cloud the title: Cox v. Smith and Forward, 10 Or. 418; Wilhelm v. Woodcock, 11 Or. 518.

Lies to restrain waste, threatened or being committed: Sheridan v. McMullen, 12 Or. 150.

When emergency is pressing, on *prima facie* case shown, temporary injunction may be granted pending legal proceedings to determine the rights of the parties: Walts v. Foster, 12 Or. 247.

To have collection of a tax, part of which is illegal, restrained, the part that is legal must have been paid or tendered: Brown v. School Dist. No. 1, 12 Or. 345.

Lies to restrain a resale of property for taxes by a city after power has been exhausted by a void assessment and sale: Dowell v. Portland, 13 Or. 248.

Tax-payer may maintain a suit to enjoin county officers from expending money for fraudulent or illegal purposes: Carman v. Woodruff, 10 Or. 133; White v. Commissioners, 13 Or. 317.

What complaint in an action on an injunction bond must allege: Olds v. Cary, 13 Or. 362.

When attorneys' fees in an injunction suit are recoverable as damages, in an action on the bond: Id.

**Injunctions** (continued).

Appeal and not injunction is the proper remedy to prevent enforcing an erroneous judgment for costs: *Nicklin v. Hobin*, 13 Or. 406.

Riparian owner is entitled to injunction to prevent diversion of a stream, although he is injured but slightly, and uses but little of the water: *Weiss v. Or. Iron etc. Co.*, 13 Or. 496.

Legislature cannot divert property from the use for which dedicated to the public; and any person interested is entitled to enjoin such diversion: *P. & W. V. R. R. Co. v. Portland*, 14 Or. 188.

Injunction will be refused, and party remanded to his action at law, where it appears that the trespass committed is discontinued, and damages is the object of the suit: *Ewing v. Rourke*, 14 Or. 514.

Courts will protect possessory rights in public lands before patent, by injunction against irreparable injury by waste: *Colwell v. Smith*, 1 W. T. 92.

Appeal does not lie from order granting or refusing temporary injunction: *N. P. R. R. Co. v. W. F. & Co.*, 2 W. T. 303.

Attaching creditor is entitled to injunction to restrain wife from foreclosing fraudulent chattel mortgage on her husband's chattels: *Meacham Arms Co. v. Swarts*, 2 W. T. 412.

**Innkeepers.**

Lien of, for unpaid charges, covers property of guest, or of another put in his possession by the guest: *Cook v. Kane*, 13 Or. 482.

Such lien attaches to property of third person in the hands of guest as bailee, coming to the innkeeper by virtue of the innkeeping relation without notice of the true ownership: *Id.*

Piano of third person, received by guest in his own name, and by his request put in possession of the innkeeper as the property of the guest, is covered by innkeepers' lien: *Id.*

**Insanity.** See Fraud and Deceit.

Deed of insane person is void, and may be impeached when offered to prove title in ejectment: *Farley v. Parker*, 6 Or. 105.

**Insanity (continued).**

Opinion of intimate acquaintance admissible on the question of sanity, though he does not state in express words that he is an intimate acquaintance: *Id.*

Not presumed where the testator's malady was in its nature occasional or temporary, that he was insane at the time of making his will: *Heirs of Clark v. Ellis*, 9 Or. 128.

Delirium in an aged, infirm person distinguished from insanity: *Id.*

Insanity as a defense to crime: *State v. Murray*, 11 Or. 413; *McAllister v. Territory*, 1 W. T. 360.

If it appear that the accused could distinguish between right and wrong as to the particular act, that he knew it was wrong and would subject him to punishment, the defense will fail: *Id.*

Must be proved beyond a reasonable doubt in Oregon, as a defense, that at the time the accused labored under diseased state of mind so excessive as to overwhelm reason, conscience, and judgment: *Id.*

As a matter of independent defense, insanity must be proved to the satisfaction of the jury, unless the facts on which it is based are part of the *res gestæ*: *McAllister v. Territory*, 1 W. T. 360.

A mere blow inflicted on the defendant, nothing appearing to show its severity or other physical consequence, is not evidence from which insanity may be inferred: *Id.*

**Insolvency.** See Assignment for Benefit of Creditors.

Where corporation is shown to be insolvent, a judgment against it and return of *nulla bona* are not necessary before suit against stockholders: *Hodges and Wilson v. Silver Hill Mining Co.*, 9 Or. 200.

Return of *nulla bona* is but one kind of proof of insolvency, and it may be proved otherwise: *Id.*

Discharge in bankruptcy, of one who has previously concealed a part of his property, does not preclude creditor, not a party, from pursuing the property: *Besser v. Joyce*, 9 Or. 310.

Resident creditor cannot collaterally attack discharge of debtor, under Territorial Insolvent Act, for fraud, especially when it is not shown that he has no knowledge of the fraud at the time of the discharge: *Rosenthal v. Schneider*, 2 W. T. 144.

**Instructions to Jury.** See Criminal Law; Jury and Jury Trial.

**Insurance.**

Warranty in insurance defined; representations distinguished: *Buford v. N. Y. Life Ins. Co.*, 5 Or. 334.

Warranties must be pleaded, and are conditions precedent by the assured, and the burden is on him to prove: *Id.* Representations, if false, are to be pleaded and proved by the insurer: *Id.*

The court construes the contract, whether of warranty or representation, and should not leave the question to the jury: *Id.*

The truth or falsity of the answers of assured in the application, and not whether such answers were material and warranties, the question for the jury: *Id.*

What is "doing insurance business" under statute of Washington Territory, by agent of foreign corporation: *Hacheny and Beno v. Leary*, 12 Or. 40.

Taking of note by a resident agent in Washington Territory, for an installment of premiums due a foreign company which has not complied with the statute, is doing insurance business in Washington Territory: *Id.*

Such note is void and cannot be enforced: *Id.*

**Interest.**

May be allowed on the amount of a mechanic's lien: *Willamette Falls etc. Co. v. Riley*, 1 Or. 183.

Not allowed on mutual accounts until balanced and settlement is had: *Catlin v. Knott*, 2 Or. 321.

Where new law alters rate, interest recoverable under old law to date of new, then under new law: *Stark v. Olney*, 3 Or. 88.

Note calling for three per cent per month, valid when made, enforced according to its terms: *Besser v. Hawthorne*, 3 Or. 129.

Compounding interest under act of 1854: *Murray v. Oliver*, 3 Or. 539.

Interest not allowed to executor or his heirs on setting aside a conveyance of land belonging to the estate and bought in by the executor through an agent: *Layton v. Hogue*, 5 Or. 93.

It is error to allow interest in excess of the legal rate in a judgment: *Breemer & Co. v. Fleckenstein and Mayer*,



**Interest (continued).**

9 Or. 266; Roeder, Peabody, & Co. v. Brown, 1 W. T. 112.

Note given for payment of interest upon interest already due is valid: Hathaway v. Sewall, 11 Or. 66.

State is not entitled to interest upon recovery from a county of a balance of unpaid taxes: State v. Multnomah County, 13 Or. 287.

Residuary legatee not chargeable with, after final settlement, on note previously given the executor for funds belonging to the estate: Leahy v. Cardwell, 14 Or. 171.

Judgment on a note cannot bear greater interest than six per cent per annum, though the note provided for three per cent per month: Roeder, Peabody, & Co. v. Brown, 1 W. T. 112.

One seeking to recover a larger than the legal rate must make certain that his contract in that respect is clear and unmistakable: Hazard v. Maxon, 1 W. T. 584.

Court being unable to interpret an ambiguous provision in contract for greater than legal rate, rejected the interest clause as repugnant: *Id.*

Not allowed on open account, unless stipulated for: Baxter v. Waite, 2 W. T. 228.

When it is admitted in the pleadings that plaintiff is entitled to recover on part of an open demand sued on, he is entitled to interest on such amount from the commencement of the action: Breemer v. Burgess 2 W. T. 290.

Payment and acceptance of interest on a promissory note relieves it from statute of limitations: Koslowski v. Yesler, 2 W. T. 407.

**Interpleader.**

Assignee need not intervene in an attachment against the property assigned to him for the benefit of creditors, to move for its dissolution, as it is *ipse facto* dissolved by the assignment: Tichenor v. Coggins, 8 Or. 270.

The right to interplead or to intervene under the Code discussed: *Id.*

Defendant in an action by husband and wife on note due the wife, being garnished by husband's creditors claiming the note to be his, may file bill of interpleader: Fahie v. Lindsay, 8 Or. 474.

**Interpleader** (continued).

Evidence to prove collusion of plaintiff and some of the defendants is not admissible after the order allowing interpleader has been made: *Id.*

No order of interpleader necessary to enable defendant, in mortgage foreclosure suit, to file answer to the new matter in answer of co-defendants claiming adversely: *Ladd and Tilton v. Mason*, 10 Or. 308.

**Interpreter.**

Witness may translate document written in a foreign language, though not sworn as interpreter: *Krewson & Co. v. Purdom*, 13 Or. 563.

In the trial of one unacquainted with the English language, a sworn interpreter should make known the charge, and the plea be entered by the same means, and the evidence during the trial be made known to the defendant: *Elick v. Territory*, 1 W. T. 136.

**Intervention.** See *Interpleader*.

**Jailer.**

Sheriff may appoint, and is responsible for jailer's acts, but the county is not liable for his compensation: *Crossen v. Wasco County*, 6 Or. 215.

**Jeopardy.**

Sale of liquor to Indians may be punished for the same offense by territorial law, and also act of Congress: *Oregon v. Coleman*, 1 Or. 191.

Conviction of disturbing the peace before city recorder, no bar to prosecution for assault and battery in Circuit Court: *State v. Sly*, 4 Or. 277.

Conviction of taking saddle and bridle, bar to charge of taking a horse at same time and place, the property of the same person: *State v. McCormack*, 8 Or. 236.

Test is not whether defendant has been tried for same act, but same offense: *State v. Stewart*, 11 Or. 52; *S. C.*, 11 Or. 238.

Conviction of assault and battery no bar to prosecution for kidnaping: *Id.*

**Joinder of Actions.** See *Pleading*.

**Joinder of Parties.** See *Parties*; *Joint and Several Liability*.

**Joint and Several Liability.**

Consideration, good as to one joint obligor, is good as to the others, and cannot be severed: *Hoxie v. Hodges*, 1 Or. 251.

**Joint and Several Liability** (continued).

Effect in this state of judgment of another state against joint debtors, upon the party appearing in the action wherein the judgment was rendered: *Swift v. Stark*, 2 Or. 97.

Such judgment is *prima facie* evidence of the indebtedness of the joint debtors not served or appearing: *Id.*

Payment by one joint debtor of part of debt revives the liability of all the debtors: *Partlow v. Singer*, 2 Or. 307.

Persons jointly liable on a note by its terms must be sued jointly, though the fact be that they are jointly and severally liable: *Kamm v. Harker*, 3 Or. 208.

Liability of one joint maker where the other alters note after same is signed: *Wills v. Wilson*, 3 Or. 308.

Entry of judgment against one defendant served, proper where obligation is joint and several: *Simpson v. Prather*, 5 Or. 86.

Release of one joint debtor on a joint and several promissory note releases the co-debtors: *Crawford v. Roberts*, 8 Or. 324.

On joint and several contract, under the Code, judgment may be rendered against some, leaving the action to proceed against the others: *Sears v. McGrew*, 10 Or. 48.

A covenant with persons jointly and severally liable on a bond, to indemnify them, will follow the bond, and be held joint and several also: *Hughes v. Oregon R'y and Nav. Co.*, 11 Or. 437.

Sheriff and attaching creditors are not liable jointly for conversion in taking money from person of prisoner and levying thereon under several attachments: *Dahms v. Sears*, 13 Or. 47.

In action on an alleged joint contract, where the proof fails as to some of the defendants, judgment may be taken against one defendant proved liable, and dismissed as to the others: *Ah Lep v. Gong Choy*, 13 Or. 205; *Fisk v. Henarie*, 14 Or. 29.

But this does not authorize a recovery against part of the defendants in such case, where the others are also liable: *Id.*

When tenants in common unite in contracting with a broker to sell their land, they are properly joined as defendants in an action for breach: *Id.*

**Joint and Several Liability** (continued).

The contract, and not the fact of their co-tenancy, determines their joint or several liability: *Id.*

In a suit for an accounting between partners, they are usually severally liable, and not jointly: *Bloomfield v. Buchanan*, 14 Or. 181.

But where there is a concerted action by some of the partners to exclude another from the profits, they are jointly and severally liable: *Id.*

Where in an answer in replevin defendants admit a joint taking and detention, they are not entitled to an instruction that no case has been established as to one of them: *Moorhouse v. Donaca*, 14 Or. 430.

Principal and guarantor are severally, and not jointly, liable on a contract of guaranty, and should not be joined as defendants: *Tyler v. T. of T. A. & P. U.*, 14 Or. 485.

Where an action is brought against two persons on a joint liability, a verdict cannot be sustained unless joint liability is proven: *Gove v. Moses*, 1 W. T. 7.

**Judges.** See Police Judge.

Certificate authenticating record from any state must show judge's official character: *Pratt v. King*, 1 Or. 49.

But where it does not appear that there are other judges, he is presumed the only judge: *Keyes v. Mooney*, 13 Or. 179.

May appoint special term, under statute: *O'Kelly v. Territory*, 1 Or. 51.

At chambers, have all powers of court, in election contest: *Myers v. Warner*, 3 Or. 212.

A county judge, elected, holds office for four years except in case of death or resignation: *State v. Johns*, 3 Or. 533.

Indictment against a judge for feloniously receiving illegal compensation: *State v. Perham*, 4 Or. 188.

Money illegally received by a judge under a claim for salary may be recovered by county: *Grant County v. Sels*, 5 Or. 243.

Objection that judge is not authorized to sit in a criminal case cannot be taken for the first time in the Supreme Court: *State v. Whitney*, 7 Or. 386.



**Judges (continued).**

Right to the office cannot be tried collaterally in a criminal case: *Id.*

Act of 1878 (sec. 2287, Hill's A. L.), providing for election of judges of Supreme and Circuit Courts in distinct classes is not unconstitutional as giving governor power to appoint in the *interim*: *Cline and Newsome v. Greenwood and Smith*, 10 Or. 230.

The office came into existence at its creation, and *ipse facto* became vacant: *Id.*

Act giving judge power to try election contest in vacation is not unconstitutional: *Cresap v. Gray*, 10 Or. 345.

Judge may be compelled by *mandamus* to sign bill of exceptions: *Ah Lep v. Gong Choy*, 13 Or. 205.

Term of circuit judge is six years; but where vacancy occurs during the term, the person elected holds not for six years, but for remainder of unexpired term: *State v. Ware*, 13 Or. 380.

Judge at chambers cannot make an order dissolving an attachment: *Suffern v. Chisholm*, 1 W. T. 486.

Cannot in vacation supply, by *nunc pro tunc* order, an omission from records of previous term: *Hale v. Finch*, 1 W. T. 517.

Powers in vacation are governed and limited by statute, and it must appear on the face of the record that the judge acted within the statute: *Id.*

**Judgments and Decrees.** See Appeal and Error; Costs and Disbursements; Jurisdiction; Justice of the Peace; Res Judicata.

1. RENDERING AND ENTRY.

2. BY CONFESSION.

3. BY DEFAULT.

4. EFFECT AND BAR.

5. LIEN.

6. REVIVAL.

7. SATISFACTION.

8. SETTING ASIDE AND VACATION.

9. CORRECTION.

10. IMPEACHMENT.

11. ACTION ON AND DEFENSE.

1. RENDERING AND ENTRY.

The court has no authority to enter judgment on award made after referee's authority has expired: *Hanner, Jennings, & Co. v. Coffin*, 1 Or. 99.

**Judgments and Decrees (continued).**

May be entered against appellant and surety on affirmation of appeal from County Court: Charman and Warner v. McLane, 1 Or. 339.

For costs and disbursements in preliminary examination against prosecuting witness is void: McDonald v. Cruzen, 2 Or. 259.

In foreclosure suit between several mortgage lien-holders: Chavener v. Wood, 2 Or. 182.

When judgment on the pleadings will be rendered: Heatherly v. Hadley, 2 Or. 269; Simpson v. Prather, 5 Or. 86; Bowles v. Doble, 11 Or. 474.

Of default by county clerk without judicial direction: Graydon v. Thomas, 3 Or. 250; Crawford v. Beard, 12 Or. 447.

Judgment entered should show unequivocally what matters were adjudicated: Dray v. Crich, 3 Or. 298.

Entry against one defendant served, proper where action is joint and several: Simpson v. Prather, 5 Or. 86.

Duty of court in divorce cases to award one third of real property under statute is peremptory: Wetmore v. Wetmore, 5 Or. 469.

Having rendered judgment but failed to record same at length, a justice may subsequently record the judgment in his docket: Knapp v. King, 6 Or. 243.

In the absence of fraud, a judgment by a justice entered as of the 6th, when rendered on the 11th of April, by a justice, is not void: Saunders v. Pike, 6 Or. 312.

Justice may take case under advisement, and without adjourning to a day certain, afterward render judgment: Id.

Court has jurisdiction to hear the testimony in vacation by consent, and render judgment at subsequent term: Roy v. Horsley, 6 Or. 382.

A stipulation for a decree affecting property rights of all parties to a suit, but not entered into by all, cannot be enforced: Adams v. Wilson, 6 Or. 391.

Judgment for costs in criminal case, if not entered within reasonable time, does not operate as a lien against purchaser without notice: State v. Munds, 7 Or. 80.

Judgment must be rendered against all the defendants, in conversion, on general verdict: Cauthorn v. King, 8 Or. 138.

**Judgments and Decrees** (continued).

In action on joint and several contract, judgment may be rendered against some, leaving the action to proceed as to other, defendants: *Sears v. McGrew*, 10 Or. 48.

In action to condemn right of way, judgment for the land, absolutely, cannot be rendered, and an easement only is acquired: *O. R. & N. Co. v. Real Estate Co.*, 10 Or. 444.

Judgment on the pleadings, except in the absence of reply to new matter in the answer, held bad practice: *Bowles v. Doble*, 11 Or. 474.

Judgment rendered upon a verdict found for plaintiff, after testimony of defense was excluded, on the objection that the answer did not constitute a defense, is viewed strictly on appeal: *Specht v. Allen*, 12 Or. 117.

In an action on a joint obligation, judgment may be had against one defendant proved liable, and dismissed as to the others: *Ah Lep v. Gong Choy*, 13 Or. 205.

Upon taking judgment against the debtor ordering attached property sold, no further judgment can subsequently be entered against the garnishee: *Carter, Rice, & Co. v. Koshland*, 12 Or. 492; modified, *Carter, Rice, & Co. v. Koshland*, 13 Or. 615.

Judgment cannot order attached property sold, when attachment has already been released: *Ah Lep v. Gong Choy*, 13 Or. 205.

After judgment against the principal debtor, and after the garnishee proceedings are subsequently determined, judgment against the garnishee may be entered: *Carter, Rice, & Co. v. Koshland*, 13 Or. 615.

In an action on a contract against several defendants, if the proof fails as to some, the judgment may be rendered against those proved liable: *Fisk v. Henarie*, 14 Or. 29.

Judgment *non obstante veredicto* cannot be rendered, because of a defective statement in the pleadings, if the defect is such as can be cured by verdict: *Andros v. Childers*, 14 Or. 447.

Entry of verdict of guilty, and copy of warrant of execution, do not constitute a judgment in a criminal case: *Regan v. Territory*, 1 W. T. 31.

District Court cannot, even with consent of parties, enter,

**Judgments and Decrees** (continued).

as of a past term, decree made at chambers in vacation:  
Puget Sound Ag'l Co. v. Pierre Co, 1 W. T. 75.

Record showing motion for new trial overruled, and the following entry: "Whereupon the court orders that plaintiff pay the costs of suit, and that the execution issue therefor,"—the entry is a valid judgment: Huntington v. Blakeney, 1 W. T. 111.

Judgment on note cannot be entered for three per cent per month interest, though the stipulation in the note be for such rate, when the legal rate was six per cent at the time of executing the note: Roeder, Peabody, & Co. v. Brown, 1 W. T. 112.

Judgment against defendant who has given bond for release of attachment may be entered against his sureties also, to the extent of their stipulation in the bond: Rodolph v. Mayer, 1 W. T. 133.

When the whole amount of the debt, secured by mortgage, is due, judgment may be rendered therefor, to have same effect as a lien, as other judgments, except as to manner of being satisfied: Hays v. Miller, 1 W. T. 143.

Simple decree of foreclosure cannot be amended *nunc pro tunc* to make it a lien on all the debtor's property, so as to prejudice a prior mortgage or encumbrance on other property of the mortgagor: *Id.*

Judgments *nunc pro tunc* are only rendered in furtherance of justice; never to work injustice: *Id.*

Judgment against husband for reasonable expenses of wife, including counsel fees, is properly rendered on dismissing husband's suit for divorce at his motion: Thorndike v. Thorndike, 1 W. T. 175.

Power of judge in vacation to render *nunc pro tunc* judgment to supply omission in records of previous term is to be strictly exercised within the statute: Hale v. Finch, 1 W. T. 517.

Such authority does not appear for entering the judgment in this case, *nunc pro tunc*, by judge in vacation, to have relation as of term: *Id.*

Judgment not entered in journal, nor bearing file mark of clerk, may be established by competent proof after death of judge who rendered it: Eakin v. McCraith, 2 W. T. 112.



**Judgments and Decrees (continued).**

Judge in vacation, at chambers, may render judgment in default in any case pending in the district, though he is not in the county where the suit was commenced, at the time of rendering judgment: *Murne v. Schwabacher Bros. & Co.*, 2 W. T. 130.

Judgment for nominal damages is properly rendered where the pleadings admit the facts, and the plaintiff moves for judgment on the pleadings instead of going to trial on the question of the amount of damages: *Hadlan v. Ott*, 2 W. T. 165.

Judgment presumed entered before notice of appeal, though the latter appears on the record before the former, both being in the records of the same day: *P. S. I. Co. v. Worthington*, 2 W. T. 472.

**2. BY CONFESSION.**

By partner, not binding on his partner or firm property, unless made in an action pending: *Richardson v. Fuller*, 2 Or. 179.

Sworn statement that the indebtedness arose on promising notes for money is insufficient: *Id.*

Statement must be definite and particular: *Id.*

After action brought, the confession need not state the facts out of which the indebtedness arose: *Miller v. Bank of British Columbia*, 2 Or. 291; *Miller v. Oregon City Mfg. Co.*, 3 Or. 24.

Such judgment can only be impeached, if regular on its face, by suit in equity for fraud: *Id.*; *Allen v. Norton*, 6 Or. 344.

President of corporation is competent to confess judgment against a private corporation: *Id.*

Question of fraud in obtaining should not be determined on motion and affidavits: *Id.*

Court refused to set aside a judgment obtained by confession in favor of director and against his corporation: *Id.*

Judgment indorsed on the statement and entered in judgment-book have each the force of duplicate copies, and each is original: *King v. Higgins*, 3 Or. 406.

Omission of clerk to enter same in judgment-book does not affect judgment, except in favor of one who has been misled by it: *Id.*

Guardian *ad litem* may have full power to bind an infant

**Judgments and Decrees (continued).**

defendant by admissions, even to the confession of judgment: *English v. Savage*, 5 Or. 518.

A judgment by confession on a contingent liability is valid, and may be enforced by execution: *Allen v. Norton*, 6 Or. 344.

**3. BY DEFAULT.**

A judgment for failure to answer an amended complaint is erroneous unless the record affirmatively shows that the defendant was served with a copy of the amended complaint: *Tolmie v. Otchin*, 1 Or. 95.

A default against corporation, erroneous unless the record shows that service was had upon proper officer: *Willamette Falls etc. Co. v. Williams*, 1 Or. 112.

Allegations of complaint will not aid return in this respect: *Willamette Falls etc. Co. v. Clark*, 1 Or. 113.

Default, where record shows demurrer to complaint undisposed of, is error: *Willamette Falls etc. Co. v. Smith*, 1 Or. 181.

Upon default in Justice's Court, District Court has discretionary power to allow answer and defense on appeal: *Crandall v. Piette and Davidson*, 1 Or. 226.

Default on complaint on note not alleging facts, but mere conclusions, erroneous: *Williams v. Knighton*, 1 Or. 234.

After service of summons to appear "forthwith" is wholly void: *Hunsaker v. Coffin*, 2 Or. 107.

County clerk may enter, without judicial direction in certain cases: *Graydon v. Thomas*, 3 Or. 250; *Crawford v. Beard*, 12 Or. 447.

In so doing his function is ministerial, not judicial: *Id.*

Such judgment will not be disregarded for slight informalities: *Id.*

Judgment for want of answer can only be taken when defendant has been duly served, and has not answered within the time allowed by law: *Smith v. Ellendale Mill Co.*, 4 Or. 70; *Trullenger v. Todd*, 5 Or. 36; *Mitchell v. Campbell*, 14 Or. 454.

When answer is stricken out in Justice's Court, and defendant refuses to answer, judgment given is judgment for want of answer, and not appealable: *Long v. Sharp*, 5 Or. 438.

**Judgments and Decrees** (continued).

Refusal to set aside default is discretionary, and will not be reviewed on appeal, except in case of abuse: *White v. Northwest Stage Co.*, 5 Or. 99; *Bailey v. Williams*, 6 Or. 71.

Default in Justice's Court set aside where docket does not show that defendant was given an hour to appear: *Gaunt v. Perkins*, 8 Or. 354.

Default after due service, but without allowing defendant full time to plead, is not void, but erroneous: *Woodward v. Baker*, 10 Or. 491.

Judgment in default has the same effect as *res judicata* as though rendered after verdict: *Neil v. Tolman*, 12 Or. 289.

Entry of default by clerk in vacation is not unconstitutional: *Crawford v. Beard*, 12 Or. 447.

Upon service of summons by a "deputy constable," the record not showing the appointment of any such person, is void: *Prickett v. Cleek*, 13 Or. 415.

Default upon service by publication, where the statutory requirements have not been complied with, and before time for answering expired, is void: *Montgomery v. Manning*, 1 W. T. 434.

Rendered in chambers by judge at another county in same district where suit is commenced is valid: *Murne v. Schwabacher Bros. & Co.*, 2 W. T. 130.

**4. EFFECT AND BAR.**

Decision of surveyor-general in favor of occupant's right of possession of claim bars inquiry by the courts: *Pin v. Morris*, 1 Or. 230.

Decree between persons having no interest in land in controversy void: *Lownsdale v. Portland*, 1 Or. 381.

Of County Court, in action in which title to real property was in issue, is not wholly void, and the sending up the papers and proceedings on appeal operates as certificate to Circuit Court: *Gird v. Morehouse*, 2 Or. 53.

Effect of judgment in another state against joint debtors, upon party appearing therein: *Swift v. Stark*, 2 Or. 97.

Such judgment is a merger of the original contract sued upon, and *prima facie* evidence against joint debtors not served or appearing: *Id.*

Defendant appearing in the original cause cannot have

**Judgments and Decrees** (continued).

the same re-examined in an action on the judgment:  
Id.

Effect of decree in foreclosure suit, as regards subsequent lien creditors made parties: *Chavener v. Wood*, 2 Or. 182.

In pleading a former suit as a bar, it is necessary to state facts showing the matter determined therein: *Heatherly v. Hadley*, 2 Or. 269.

Judgments bind only parties and privies: *Ritchey v. Riskey*, 3 Or. 184.

Of inferior tribunal acting within its jurisdiction, binding until reversed: *Warner v. Myers*, 3 Or. 218.

Under statute of 1854, court had power to transfer the property of the party in fault in divorce proceedings, and vest it in the children: *GrosLouis v. Northcut*, 3 Or. 394; *Doscher v. Blackiston*, 7 Or. 403.

Order in divorce case assigning custody of minor children to one of the parties is a decree appealable: *Pittman v. Pittman*, 3 Or. 472; *contra*, *Tierney v. Tierney*, 1 W. T. 568.

Recital in a decree of due service will not preclude a party from denying, when disproved by the return: *Heatherly v. Hadley and Owen*, 4 Or. 2; *Northcut v. Lemery*, 8 Or. 316.

A decree of divorce, containing no provisions as to property, the complaint making no allusion thereto, gives no right thereto: *Bamford v. Bamford*, 4 Or. 30.

Such decree cannot be disturbed except by proceedings in the nature of bill of review: Id.

Party cannot claim benefit of judgment, and at the same time appeal from it: *Moore v. Floyd*, 4 Or. 260; *Lyons v. Bain*, 1 W. T. 482.

Decree which operates as a deed is admissible in ejectment, to prove title: *Dolph v. Barney*, 5 Or. 193.

Recital in, of due service conclusive, unless clearly contradicted in the judgment roll: *Ladd v. Higley*, 5 Or. 296.

Judgments in criminal cases, for fine or for costs and disbursements, may be enforced as in a civil action: *Whitley v. Murphy*, 5 Or. 328.

Judgments of the territorial courts transferred to state



**Judgments and Decrees** (continued).

courts, by act of June 4, 1859, are not affected by the repeal of the act, and are enforceable as before: *Strong v. Barnhart*, 5 Or. 496.

Decree against infant, without fraud, where the court has jurisdiction, is as binding as against an adult: *English v. Savage*, 5 Or. 518.

Judgment of County Court, admitting will to probate, is conclusive until vacated or impeached: *Hubbard v. Hubbard*, 7 Or. 42.

Decree of foreclosure against an estate, where the heirs are not made parties, is void: *Renshaw v. Taylor*, 7 Or. 315.

Decree divesting title to real property, and vesting it in another person, is inoperative to divest the title, if the court had no power to vest it in such person: *Doscher v. Blackiston*, 7 Or. 403.

The effect of a decree is interpreted and determined by the intention in making it: *Id.*; *Harvey's Heirs v. Wait*, 10 Or. 117.

Effect of a decree in equity, on a judgment at law, concerning the same property: *Starr v. Stark*, 7 Or. 500.

Decree in equity operates on the person, and not on the judgment, in such case: *Id.*

Decree establishing a party's right to property, from which he has been ejected at law, operates on the parties, and may enjoin the enforcing of the judgment: *Id.*

Conclusive as to all issues, whether actually litigated or not, and parol evidence is not admissible to show that certain issues were withdrawn: *Barrett v. Failing*, 8 Or. 152; *Glenn v. Savage*, 14 Or. 567.

Judgment on note of principal, no bar to action against principal and surety on another note given as collateral security: *McCullough v. Hellman*, 8 Or. 191.

Decision of board of school land commissioners is conclusive, and cannot be reviewed by state courts: *Corpe v. Brooks*, 8 Or. 222.

The principle of *stare decisis* is the policy of the courts, especially where to overrule a former decision will work a conviction: *State v. Clark*, 9 Or. 466.

Whether a decree in administration proceeding is final or not depends on the intention of the court: *Harvey's Heirs v. Wait*, 10 Or. 117.

**Judgments and Decrees (continued).**

Decisions of secretary of state in the allowance of claims are not judicial in their nature or effect: *State v. Brown*, 10 Or. 215.

Order dissolving or refusing to dissolve an attachment is a final order under the Code: *Sheppard v. Yocum*, 11 Or. 234; *Suffern v. Chisholm*, 1 W. T. 486.

Judgment is conclusive as to all matters litigated, or that might have been litigated, in the suit: *Neil v. Tolman*, 12 Or. 289; *Glenn v. Savage*, 14 Or. 567.

Judgment in default has the same effect as judgment after verdict, as *res judicata*: *Id.*

In an attachment suit, a judgment ordering the property sold, as required by act of 1878 (sec. 157, Hill's A. L.), ends the proceedings against garnishee: *Carter, Rice, & Co. v. Koshland*, 12 Or. 492; S. C. modified, 13 Or. 615.

No general judgment against the garnishee can subsequently be rendered in such suit after judgment in the main suit: *Id.*

Judgment, though erroneous, is valid until reversed on appeal: *Nicklin v. Hobin*, 13 Or. 406.

Decree quieting title does not bind one who holds unrecorded deed, not a party to the suit, where the adverse claimant has notice, and the deed is placed of record during the suit: *Walker v. Goldsmith*, 14 Or. 125.

Judgment against a defendant for divorce and alimony cannot bind a third person mentioned therein, not a party, by enjoining him from paying over money: *Madison v. Madison*, 1 W. T. 60.

Judgment rendered upon the merits will not be affected by an erroneous ruling on an attachment: *Williams & Co. v. Miller & Co.*, 1 W. T. 88.

Judgment on foreclosure will have same effect as a lien as other judgment, only differing in the manner of being satisfied, if the whole debt is due, and the judgment is rendered accordingly: *Hays v. Miller*, 1 W. T. 143.

But simple decree for sale of mortgaged premises does not have effect as a lien on property outside the mortgage, and cannot be amended *nunc pro tunc* in this respect, to the prejudice of intervening rights: *Id.*

Decree is final when it disposes of whole controversy, leav-

**Judgments and Decrees (continued).**

ing nothing for court to do: *Sloop Leonede v. United States*, 1 W. T. 153.

Otherwise, is interlocutory, though it may, to a great extent, dispose of the merits of the cause: *Id.*

Refusal of District Court to allow the docketing of a cause on appeal from a Justice's Court, for the purpose of showing the fact of destruction of the record by fire, and to supply the loss, is a final judgment: *Mullen v. Mullen*, 1 W. T. 192.

Ruling on a motion to vacate a judgment is not a final judgment within the meaning of the Code: *Hancock v. Stewart*, 1 W. T. 323.

Sentence in criminal case constitutes the final judgment: *Lytle v. Territory*, 1 W. T. 435.

A *pro forma* judgment is not a final judgment, unless transcript contains certificate prescribed in section 18, page 25, Laws of 1875: *Mullen v. McGilvrey*, 1 W. T. 513.

Order of District Court awarding custody, and fixing allowance for child, is interlocutory, not final: *Tierney v. Tierney*, 1 W. T. 568.

A collusive decree of foreclosure having been entered with the intent of subordinating the rights of a third party, it being a sham and a fraud, determines no rights, and equity will not give it effect: *Connolly v. Cunningham*, 2 W. T. 242.

**5. LIEN.**

Judgment at law is not a lien on an equitable interest in land: *Smith v. Ingles*, 2 Or. 43; *Bloomfield v. Humason*, 11 Or. 229.

Plaintiff in execution, becoming purchaser, extinguishes his specific lien on the premises: *Chavener v. Wood*, 2 Or. 182.

Judgment lien may be kept alive until paid: *Murch v. Moore*, 2 Or. 189; *Dearborn v. Patton*, 3 Or. 420; *Strong v. Barnhart*, 5 Or. 496.

Lien begins from time of docketing, subject to known equitable rights in the land: *Stannis v. Nicholson*, 2 Or. 332.

Filing transcript on appeal from justice, not sufficient docketing to give lien on realty: *Dearborn v. Patton*, 4 Or. 58.

**Judgments and Decrees** (continued).

Repeal of statute; an existing lien not destroyed by act of 1864 in regard to judgment liens: *Dearborn v. Patton*, 3 Or. 420.

Duration of existing lien extended by new statute indefinitely: *Id.*

Effect of docketing judgment in partnership name, where the judgment debtor's name is properly entered, is the same as notice as though each partner's name was entered: *Id.*

Under act of 1855, certified transcript, and not mere abstract of justice's judgment. must be filed with county clerk to acquire lien on realty: *Dearborn v. Patton*, 4 Or. 58.

Time for acquiring lien of justice's judgment on realty being expired, there is no right to sue in Circuit Court, and make it such lien, without a showing in excuse for laches: *Pitzer v. Russel*, 4 Or. 124.

In felony cases, state has a lien for satisfaction of judgment from time of commission of the offense: *Whitley v. Murphy*, 5 Or. 328; *State v. Munds*, 7 Or. 80.

In such cases, the lien will be satisfied from property conveyed, in the inverse order of alienation, and that last sold is first to be charged: *Knott v. Shaw*, 5 Or. 482.

In felony cases, is enforced by execution as in civil actions; but if the property has been conveyed away, must be by suit in equity: *State v. Munds*, 7 Or. 80.

Lien in criminal case must be docketed within reasonable time to bind a purchaser without notice; after next term of court, not reasonable: *Id.*

In criminal case, does not attach to homestead the title to which is in the United States: *State v. O'Neil*, 7 Or. 141.

Judgments rank as liens on after-acquired property in the order of their docketing: *Creighton v. Leeds, Palmer, & Co.*, 9 Or. 215.

Any mark in the judgment-lien docket usually employed in business to indicate dollars and cents is sufficient to denote that the figures represent money: *De Lashmutt v. Sellwood*, 10 Or. 319.

Junior lien-holder not made party is not affected by foreclosure of a prior mortgage, and has a right to sell on execution, and is not limited to mere right to redeem: *Id.*



**Judgments and Decrees** (continued).

Lien acquired with notice of prior unrecorded deed, and not in good faith, will not have priority: *Baker v. Woodward*, 12 Or. 3.

Judgment of foreclosure, when entered for the full amount due under the mortgage, may be made a lien upon all the debtor's property, as other judgments, differing only in the manner of being satisfied: *Hays v. Miller*, 1 W. T. 143.

Simple decree for foreclosure does not constitute a lien on property outside the mortgage: *Id.*

Such decree cannot be amended *nunc pro tunc* to make it a lien upon all the debtor's property, to the prejudice of the rights of intervening lienors: *Id.*

**6. REVIVAL.**

On application for leave to issue execution on lapsed judgment, etc., validity may be inquired into: *Hunsaker v. Coffin*, 2 Or. 107.

Domestic judgment is not barred by statute of limitations in ten years, and may be kept alive until payment thereof is made: *Murch v. Moore*, 2 Or. 188; *Dearborn v. Patton*, 3 Or. 420; *Strong v. Barnhart*, 5 Or. 496.

Proceeding to keep judgment alive is strictly analogous to *scire facias*: *Id.*

What facts are pleadable on motion and answer thereto in such proceeding: *McCracken v. Swartz*, 5 Or. 62.

On defense of *nul tiel record*, trial court having inspected the record, the Supreme Court will not review the decision, not having the record before it: *Id.*; *Ladd and Reed v. Higley*, 5 Or. 296.

The proceeding is a separate proceeding, and a separate judgment roll is to be made up therein: *Id.*

On appeal the court will not look to the evidence heard below, unless in the judgment roll: *Id.*

After five years, domestic judgment can only be enforced by obtaining leave to issue execution under section 292 of the Code (sec. 295, Hill's A. L.): *Strong v. Barnhart*, 5 Or. 496.

In a proceeding to revive a dormant judgment, jurisdiction will not be inquired of, unless the want thereof appears upon face of the record: *Strong v. Barnhart*, 6 Or. 93.

**Judgments and Decrees (continued).**

Same presumption in favor of judgment in proceedings to revive, as on collateral attack: *Id.*

Only defense admissible is *nul tiel record*, or satisfaction: *Id.*

Justice's Court has not, and Circuit Court has, jurisdiction to revive a justice's judgment, a transcript of which has been docketed in the Circuit Court: *Glaze v. Lewis*, 12 Or. 347.

**7. SATISFACTION.**

A court has power to direct cancellation of record of its judgment when it is made to appear that it is satisfied: *Provost v. Millard*, 3 Or. 370.

Court refused to direct party to appear and cancel satisfied judgment in another district: *Id.*

After accepting and satisfying judgment, party cannot appeal from it: *Moore v. Floyd*, 4 Or. 260; *Lyons v. Bain*, 1 W. T. 482.

After satisfaction, additional cost bill cannot be filed, and execution thereon issued: *Snipes v. Breezley*, 5 Or. 420.

Party is not precluded by paying judgment from appealing therefrom: *Edwards v. Perkins*, 7 Or. 149.

Satisfaction of judgment against surety operates as satisfaction of a separate judgment against principal, though the former was for an amount less than the latter: *Cox v. Smith and Forward*, 10 Or. 418.

An attempted reservation by the judgment creditor in his entry of satisfaction of the judgment against the surety of "all rights" against the principal debtor is void, though the judgment against the principal is the larger judgment: *Id.*

By accepting fruits of a decree, party is estopped from appealing: *Lyons v. Bain*, 1 W. T. 482.

The fact that all the money received, excepting the statutory attorney's fee, was returned, does not change the rule: *Id.*

Acceptance by the attorney as a general rule will be regarded as acceptance by his client: *Id.*

**8. SETTING ASIDE AND VACATION.**

Under Code, court can relieve a party from a judgment taken inadvertently, without resort to equity, and in-

**Judgments and Decrees** (continued).

junction will not issue to prevent the enforcement of the judgment: *Wells, Fargo, & Co. v. Wall*, 1 Or. 295.

Bill, to set aside a judgment at law, must show specific fraud, accident, surprise, or mistake: *Snyder v. Vannoy and Hyland*, 1 Or. 344.

And it must appear that the matters complained of could not have been interposed in the suit: *Id.*

Judgment by default entered by county clerk not set aside for slight informalities: *Graydon v. Thomas*, 3 Or. 250.

Bill of review to set aside judgment is an original bill, not entertained by virtue of appellate jurisdiction: *White v. Allen*, 3 Or. 103; *Kennard v. Sax*, 3 Or. 263.

A defective decree may be reformed under a prayer for general relief in the bill: *Id.*

Where debt is justly owing, equity will not interfere, though judgment is erroneous: *Kennard v. Sax*, 3 Or. 263.

That defendant was insane at time of trial, not sufficient allegation of want of jurisdiction to set aside: *Norton v. Harding*, 3 Or. 361.

To warrant review, reason must be shown why the facts were not presented and determined: *Id.*

On motion to open decree under section 57 of the Code (sec. 58, *Hill's A. L.*), fact that affidavit for publication was made on information only may be considered: *Smith v. Smith*, 3 Or. 363.

On such motion, counter-affidavits may be filed: *Id.*

What is a collateral and what a direct attack: *Heatherly v. Hadley and Owen*, 4 Or. 1.

It must be shown that the facts relied upon to set aside decree were not and could not be known at time when decree was rendered: *Bamford v. Bamford*, 4 Or. 30; *O. R. & N. Co. v. Gates*, 10 Or. 514; *Crews v. Richards*, 14 Or. 442.

Granting or refusal of motion to set aside default discretionary, and except in case of abuse, not reviewable: *White v. Northwest Stage Co.*, 5 Or. 99; *Bailey v. Williams*, 6 Or. 71; *Mitchell v. Campbell*, 14 Or. 454.

A judgment is not vacated by appeal in criminal case: *Whitley v. Murphy*, 5 Or. 328.

**Judgments and Decrees** (continued).

Bill must set out the matters determined, in such manner that in setting aside the judgment the court can adjust the rights of the parties: *Saunders v. Pike*, 6 Or. 312.

In the absence of fraud, the judgment will not be set aside for an irregularity which works no injury: *Id.*

Decree, entered by consent against one so infirm as not to understand, will be opened in equity to protect the rights of the latter: *Watson v. Smith*, 7 Or. 448.

Justice cannot set aside his judgment, and grant new trial: *Griffin v. Pitman*, 8 Or. 342.

Judgment in default in Justice's Court, docket not showing that defendant was given an hour to appear, set aside on review: *Gaunt v. Perkins*, 8 Or. 354.

Every court has power, whether at same or subsequent term, to vacate its own decree rendered without jurisdiction: *Ladd and Tilton v. Mason*, 10 Or. 308.

Judgment in Justice's Court obtained by fraud against defendant having a good defense will be set aside, and enjoined in equity, and defendant allowed to answer: *Marsh v. Perrin*, 10 Or. 364.

Judgment of Justice's Court cannot be set aside for intimidation of witnesses by a broil in the court, on account of which a party withdrew; remedy is by appeal: *Scoggin v. Hall*, 12 Or. 372.

Though bills for review have been abolished in form by the Code, the remedy to set aside a decree exists by suit in equity: *Crews v. Richards*, 14 Or. 442.

But such suit cannot be maintained where the facts relied on were both known, and could have been used in the former suit: *Id.*

Refusal to set aside a default upon proper showing made is an abuse of discretion: *Mitchell v. Campbell*, 14 Or. 454.

Delay in suing to set aside a fraudulent decree does not amount to laches, unless the party had knowledge or means of knowing the fraud: *Sedlak v. Sedlak*, 14 Or. 540.

But acquiescence and enjoyment of the benefits of a decree for thirty years amounts to fatal laches, and bars relief: *Id.*



**Judgments and Decrees** (continued).

Defective affidavit in an attachment not cause for setting aside judgment: *Nesqually Mill Co. v. Taylor*, 1 W. T. 1.

Defect in record not materially affecting merits, not sufficient cause for setting aside judgment: *Id.*

District Court has no power to vacate judgment at the next term of court subsequent to the term in which rendered: *Hancock v. Stewart*, 1 W. T. 323.

Court of equity cannot set aside a decision made by a competent tribunal, as the Secretary of Interior in a proper case for his decision, except for fraud or mistake: *Sparks v. Brown*, 2 W. T. 426.

**9. CORRECTION.**

Defective decree may be reformed under a prayer for general relief: *White v. Allen*, 3 Or. 103.

Motion to amend decree too late after seventeen months' delay without showing excuse for the delay: *Chapman v. Wilbur*, 5 Or. 299.

Correction of decree of foreclosure is unnecessary to make same properly describe the lands, where the description is sufficient to identify same: *Board S. L. Com. v. Wiley and Davis*, 10 Or. 86.

Simple decree of foreclosure cannot be amended by *nunc pro tunc* order to be a lien upon property not included in the mortgage, to the prejudice of the rights of intervening lienors: *Hays v. Miller*, 1 W. T. 143.

Power of judge in vacation to correct record of previous term is to be strictly exercised within the statute: *Hale v. Finch*, 1 W. T. 517.

**10. IMPEACHMENT.**

Court will not go behind the execution upon proceedings to confirm a sale on execution, and on mere motion question the validity of the judgment: *Griswold v. Stoughton*, 2 Or. 61.

Judgment by default, when wholly void, may be attacked: *Hunsaker v. Coffin*, 2 Or. 107.

But not collaterally, where the record shows summons and complaint duly served: *Woodward v. Baker*, 10 Or. 491.

Judgment by confession, regular on its face, may be attacked in equity, for fraud only: *Miller v. Bank of British Columbia*, 2 Or. 291.

**Judgments and Decrees (continued).**

On collateral attack, court will not go outside of justice's docket to learn that constable was not duly appointed: *White v. Thompson*, 3 Or. 115.

Nor to learn that the appearance of defendant was special: *Id.*

Presumption of regularity of judgment does not arise where the pleadings in the case show that no jurisdiction was obtained: *GrosLouis v. Northcut*, 3 Or. 394.

Recitals in decree, of due service, when the record shows otherwise, do not aid the decree on collateral attack: *Heatherly v. Hadley and Owen*, 4 Or. 2; *Northcut v. Lemery*, 8 Or. 316.

Every intendment in favor of a judgment rendered by court having jurisdiction: *Fulton v. Earhart*, 4 Or. 62.

Error does not render judgment void when collaterally attacked: *Dolph v. Barney*, 5 Or. 192.

Judgment not void, unless court had no jurisdiction of parties or of subject-matter: *Id.*

Foreign judgment, regular on its face, introduced as evidence, may be attacked by extrinsic evidence of fraud or want of notice: *Murray v. Murray*, 6 Or. 17.

Same rule as to collateral attack of judgment by confession as other judgments: *Allen v. Norton*, 6 Or. 344.

Judgment in ejectment is conclusive as to defendant's legal title, and right of possession on collateral attack: *Hill v. Cooper*, 8 Or. 254.

Judgment against a married woman as surety on a note cannot be impeached collaterally, where the record does not show she was a married woman: *Farris v. Hayes*, 9 Or. 81.

Whether defective affidavit on publication of summons may be taken advantage of on collateral attack, *quære*; but an insufficient order of publication may: *Odell v. Campbell*, 9 Or. 298.

What publication, and proof of publication, insufficient to sustain judgment on collateral attack: *Northcut v. Lemery*, 8 Or. 316; *Odell v. Campbell*, 9 Or. 298.

Presumption in favor of judgment of court of general jurisdiction does not obtain where the court is exercising special statutory power: *Northcut v. Lemery*, 8 Or. 316; *Odell v. Campbell*, 9 Or. 298.

**Judgments and Decrees (continued).**

Judgment by default after service, but without allowing defendant full time to plead, is not open to collateral attack: *Woodward v. Baker*, 10 Or. 491.

Decree of court on distribution of an estate, ordering payment of the share of a devisee to be paid to an assignee thereof, is void on collateral attack: *Harrington v. La Rocque*, 13 Or. 344.

Where proper service has been had, the court may allow amendment of record to show that fact, after rendition of judgment upon the assumption of due service, and such amended return protects the judgment from collateral attack: *Blinn v. Crosby*, 2 W. T. 109.

**11. ACTION ON, AND DEFENSE.**

Defendant in a judgment cannot be garnished by creditor of plaintiff therein: *Norton v. Winter and Lattimer*, 1 Or. 47; *Despain v. Crow*, 14 Or. 404.

Effect of foreign judgment against joint debtors in action in Oregon thereon: *Swift v. Stark*, 2 Or. 97.

Domestic judgment does not fall within statute of limitations: *Murch v. Moore*, 2 Or. 189; *Dearborn v. Patton*, 3 Or. 420; *Strong v. Barnhart*, 5 Or. 496.

In Oregon it is in the power of a judgment creditor to keep judgment alive forever: *Id.*

In pleading judgment of court of special jurisdiction, need not state facts that show the court had jurisdiction: *Toby v. Ferguson*, 3 Or. 27.

Judgment creditor has no right to sue on domestic judgment, unless necessary to give him the full benefit of his judgment: *Pitzer v. Russell*, 4 Or. 124.

So where he has failed to make judgment of justice a lien on debtor's realty, he cannot sue thereon to acquire such lien without explaining his laches: *Id.*

Right of action on undertaking for costs does not pass to assignee by assignment of judgment: *Dray v. Mayer*, 5 Or. 185.

Statute of limitations does not apply to proceedings under section 292 of the Code (sec. 295, Hill's A. L.), in reference to enforcing dormant judgments: *Strong v. Barnhart*, 5 Or. 496.

Decree of divorce must be pleaded in answer in equity to be admissible as evidence: *Murray v. Murray*, 6 Or. 26.

Allegation of judgment of court of inferior jurisdiction

**Judgments and Decrees (continued).**

must show facts conferring the jurisdiction: *Dick v. Wilson*, 10 Or. 490.

Pleading judgment of a Justice's Court must allege the beginning of the action, the court, the nature and amount of the claim, and that judgment was duly given thereon: *Page & Co. v. Smith*, 13 Or. 410.

**Judgment Roll.**

Absence of material paper from judgment roll no ground for reversing judgment: *Carland v. Heineborg*, 2 Or. 75.

Return, in obedience to writ of review, is part of judgment roll: *Johns v. Marion County*, 4 Or. 46.

Under the Code, the record includes all papers and proceedings in the judgment roll: *Tustin v. Gaunt*, 4 Or. 305.

Judgment roll is proper preliminary proof to warrant proof of sheriff's sale: *Gilmore v. Taylor*, 5 Or. 89.

What is necessary in judgment roll in probate proceedings: *Id.*

Separate judgment roll necessary in proceedings for leave to issue execution on dormant judgment: *Ladd v. Higley*, 5 Or. 296.

Jurors cannot be called to testify in subsequent suit that issues included in the judgment roll were not tried: *Underwood v. French*, 6 Or. 66.

Motion for new trial and proceedings thereon are not part of judgment roll, and must be put in the bill of exceptions to be a part of the roll to be considered on appeal: *Oregonian R'y Co. v. Wright*, 10 Or. 162; *Chung Yow v. Hop Chong*, 11 Or. 220; *State v. Drake*, 11 Or. 396; *McAllister v. Territory*, 1 W. T. 360; but see *Bowen v. State*, 1 Or. 270; *Kearney v. Snodgrass*, 12 Or. 311; *State v. Becker*, 12 Or. 318; *Jones v. Wiley*, 1 W. T. 603.

Where statute does not prescribe what papers constitute the roll, all filed should be placed in the roll: *Ankeny v. Fairview Milling Co.*, 10 Or. 390.

Affidavits in support of motion for order to abate nuisance are properly in the roll: *Id.*

Referee's report in action at law is no part of the judgment roll or transcript: *Osborn v. Graves*, 11 Or. 526.



**Judicial Sales.** See Executions, and Proceedings Supplemental; Guardian and Ward; Mortgages.

**Jurisdiction.** See Equity.

1. IN GENERAL.
2. SUPREME COURT.
3. CIRCUIT AND DISTRICT COURTS.
4. COUNTY COURT.
5. JUSTICE OF THE PEACE.
6. OTHER TRIBUNALS AND OFFICERS.
7. PARTICULAR CASES.

1. IN GENERAL.

Where the power to act is inherent, the act is valid though irregularly done; otherwise, where the power is special: *Cason v. Stone*, 1 Or. 39.

In inferior tribunals, jurisdictional facts must appear affirmatively upon the face of the record: *Thompson v. Multnomah County*, 2 Or. 34; *Johns v. Marion County*, 4 Or. 46; *Dick v. Wilson*, 10 Or. 490.

Inferior tribunal having once acquired jurisdiction, subsequent proceedings presumed regular: *Id.*

In pleading judgment of court of special jurisdiction, need not state the facts that confer jurisdiction: *Toby v. Ferguson*, 3 Or. 27.

Though complaint may not state cause of action, court may have jurisdiction: *Norman v. Zieber*, 3 Or. 197.

If inferior tribunal acts within its jurisdiction, its decision, though erroneous, is binding until reversed: *Warner v. Myers*, 3 Or. 218; *C. & G. Road Co. v. Douglas County*, 5 Or. 280.

Judgment of court having jurisdiction conclusive, and that defendant was insane at time of trial, is not sufficient showing of want of jurisdiction: *Norton v. Harding*, 3 Or. 361.

Every court has power over its own process and to prevent its abuse: *Provost v. Millard*, 3 Or. 370.

May direct a decree of record before it, to be canceled when satisfied: *Id.*

Every intendment in favor of judgment of court of competent jurisdiction: *GrosLouis v. Northcut*, 3 Or. 394; *Fulton v. Earhart*, 4 Or. 61; *Tustin v. Gaunt*, 4 Or. 305.

But even after judgment, if on the face of the pleadings the court had no jurisdiction, no presumption in its favor arises: *Id.*

**Jurisdiction (continued).**

Having obtained jurisdiction for one purpose, equity holds it for all connected therewith: *Heatherly v. Hadley and Owen*, 4 Or. 1.

Record reciting facts requisite to confer jurisdiction is conclusive when attacked collaterally: *Id.*

When the record is silent, jurisdiction is presumed: *Id.*; *Tustin v. Gaunt*, 4 Or. 305.

When the record shows that the cause of action or the parties were beyond the jurisdiction of the court, no presumption in favor of judgment, and it is void: *Id.*; *Northcut v. Lemery*, 8 Or. 316.

Strict compliance necessary in attempting to acquire jurisdiction by statute: *Id.*; *Northcut v. Lemery*, 8 Or. 316; *Odell v. Campbell*, 9 Or. 298.

Jurisdictional defects cannot be disregarded as not affecting substantial rights: *Johns v. Marion Co.*, 4 Or. 46.

Objections to, not waived by answer to the merits: *King and Lownsdales v. Boyd*, 4 Or. 326; *Goldsmith v. The Revenue Cutter*, 6 Or. 250; *Tolmie v. Dean*, 1 W. T. 46.

Where want of jurisdiction appears, it is the duty of the court at any stage, on its own motion, to dismiss: *Evans v. Christian*, 4 Or. 375; *McKay v. Freeman*, 6 Or. 449; *State v. McKinnon*, 8 Or. 487; *Tolmie v. Dean*, 1 W. T. 46.

Error does not render a judgment void on collateral attack: *Dolph v. Barney*, 5 Or. 192.

Judgment is not void, unless court had no jurisdiction of parties or subject-matter: *Nicklin v. Hobin*, 13 Or. 406.

Where court has jurisdiction of the subject-matter, voluntary appearance cures defect of service, and gives the court jurisdiction of the parties: *White v. Northwest Stage Co.*, 5 Or. 99.

Nothing short of clear contradiction in judgment roll will overcome recital of jurisdiction in judgment: *Ladd v. Higley*, 5 Or. 296.

United States cannot be sued in, or its property taken under process of, state court: *Goldsmith v. The Revenue Cutter*, 6 Or. 250.

Objection to jurisdiction is not waived by government by pleading to the merits: *Id.*

**Jurisdiction (continued).**

Court of general jurisdiction exercising a special statutory power must show by its records a strict compliance with statute: *Northcut v. Lemery*, 8 Or. 316; *Odell v. Campbell*, 9 Or. 298.

Jurisdiction is not presumed from recitals in decree of due service by publication, where the record shows that sufficient time had not elapsed after filing complaint: *Id.*

Want of jurisdiction appearing on the face of the record is considered on appeal, but no errors not specifically assigned in the notice of appeal can be considered: *State v. McKinnon*, 8 Or. 487.

Presumption in favor of judgment of a court of general jurisdiction is confined to matters within the scope of its general jurisdiction, and does not extend to statutory and special proceedings: *Odell v. Campbell*, 9 Or. 298.

In pleading judgment of inferior court, so much of the proceedings must be stated as to show that the court had acquired jurisdiction: *Dick v. Wilson*, 10 Or. 490.

From the time of service, court has jurisdiction, and subsequent proceedings, though erroneous, are not void: *Woodward v. Baker*, 10 Or. 491.

After service, judgment by default without allowing defendant full time to plead cannot be collaterally attacked: *Id.*

Judgment, though erroneous, is valid until reversed on appeal: *Nicklin v. Hobin*, 13 Or. 406.

Court having jurisdiction to render a judgment for costs, though it enters an erroneous judgment, appeal and not injunction is the remedy to prevent its enforcement: *Id.*

Want of jurisdiction, and failure to state sufficient facts, are never cured except by supplying the defects: *Tolmie v. Dean*, 1 W. T. 46.

The appellate and general jurisdiction of the courts of Washington Territory under the Organic Act: *Nickels v. Griffin*, 1 W. T. 374.

**2. SUPREME COURT.**

Jurisdiction of Supreme Court is appellate and revisory only: *Boon v. McClane*, 2 Or. 331.

Supreme Court cannot review an order partially remov-

**Jurisdiction (continued).**

ing a cause to United States court: *Fields v. Lamb*, 2 Or. 340.

Parties cannot waive notice of appeal, and give the court jurisdiction: *Oliver v. Harvey*, 5 Or. 360.

Supreme Court gains no authority for review after the time limited for taking error has expired, though the parties consent: *Stark v. Jenkins*, 1 W. T. 421.

Supreme Court gains jurisdiction over the subject-matter by precipe, and over the person by service of notice: *Schwabacher v. Wells*, 1 W. T. 506.

Unless it satisfactorily appears that the transcript contains all the evidence, Supreme Court has no jurisdiction: *McGown v. Petit*, 1 W. T. 514.

Service of notice of appeal on the clerk of the District Court is essential to give Supreme Court jurisdiction: *Blinn v. Crosby*, 2 W. T. 109.

Without joinder in the appeal, appearance, or service of notice, the Supreme Court gains no jurisdiction: *Parker v. Denny*, 2 W. T. 360.

**3. CIRCUIT AND DISTRICT COURTS.**

Circuit Court has supervisory control of inferior tribunals by *certiorari*: *Thompson v. Multnomah Co.*, 2 Or. 34.

The Circuit Court has power, under the acts of Congress, to make an order removing a cause to the United States courts: *Fields v. Lamb*, 2 Or. 340.

Multnomah Circuit Court refused to direct party to appear in Marion County, and satisfy decree there: *Provost v. Millard*, 3 Or. 370.

Circuit Court has concurrent jurisdiction with justice in assault and battery: *State v. Sly*, 4 Or. 277.

By consent, a jury may be waived, and trial before the court had in vacation, upon testimony taken before referee: *Roy v. Horsley*, 6 Or. 382.

Circuit Court has jurisdiction of both defendants, where both appear and defend, on appeal from justice, though judgment below was against one, and he alone appealed: *Cauthorn v. King*, 8 Or. 138.

Circuit Court will exercise jurisdiction to try the right to office in a city, though a municipal board has been given jurisdiction by charter: *State v. McKinnon*, 8 Or. 493.



**Jurisdiction (continued).**

But otherwise where the charter expressly confers exclusive and final jurisdiction on such board: *Simon v. Portland Com. Council*, 9 Or. 437.

Circuit Court cannot entertain action on bond of administrator removed for misconduct, until a final settlement is had by the County Court: *Hamlin v. Kinney*, 2 Or. 91; *Adams v. Petrain*, 11 Or. 304.

Where no course of proceeding is provided by the Code, the Circuit Court will have jurisdiction, and may adopt a remedy suitable and conformable to the spirit of the Code: *Aiken v. Aiken*, 12 Or. 203.

Circuit Court has, and justice has not, power to revive a justice's judgment that has been docketed in the Circuit Court: *Glaze v. Lewis*, 12 Or. 347.

Circuit Court, in exercising statutory power, under act of 1878 (c. 28, Hill's A. L.) over insolvents' estates, is a limited and inferior tribunal: *In re Goldsmith*, 12 Or. 414.

Circuit Court acquires no jurisdiction where, on appeal from justice, the respondent takes up and files the transcript: *Steel v. Rees*, 13 Or. 428.

District Court has no jurisdiction, even with consent of parties, to enter, as of a past term, a decree rendered in vacation: *Puget Sound Ag'l Co. v. Pierce Co.*, 1 W. T. 75.

District Court has no power to try a case on issue of fact without a jury, where jury trial was not waived: *Johnson v. Goodtime*, 1 W. T. 484.

Actions under sections 48, Practice Act of 1877, must be brought in court in the county of district in which the subject of the action lies, and the jurisdiction of such court is exclusive: *Wood v. Mastick*, 2 W. T. 64.

**4. COUNTY COURT.**

County Court has no power to revise assessments for taxation, but clerk and assessor have: *Rhea v. Umatilla County*, 2 Or. 298; *Darragh v. Bird*, 3 Or. 246.

Has no authority to partition and determine rights of parties to realty of estates: *Hanner v. Silver*, 2 Or. 336.

County Court is a court of superior jurisdiction in probate matters: *Russell v. Lewis*, 3 Or. 380; *Tustin v. Gaunt*, 4 Or. 305; *Monastes v. Catlin*, 6 Or. 119.

**Jurisdiction** (continued).

County Court is a court of limited jurisdiction in laying out roads: *Johns v. Marion County*, 4 Or. 46; *State v. Officer*, 4 Or. 180; *C. & G. Road Co. v. Douglas County*, 5 Or. 280.

Jurisdiction of County Courts in laying out roads may be questioned by writ of review: *Id.*

County Court, in appointing guardian for minors and lunatics, is court of superior jurisdiction: *Monastes v. Catlin*, 6 Or. 119.

Such jurisdiction pertains to Probate Courts within article 7, section 12, of the constitution: *Id.*

County Court has exclusive jurisdiction to take proof of wills, and its judgment is conclusive until impeached: *Hubbard v. Hubbard*, 7 Or. 42.

The whole record, and not the petition alone, will be examined to ascertain whether a court had power to admit a will to probate: *Moore v. Willamette T. & L. Co.*, 7 Or. 359.

County Court may assess damage for taking materials for repairing road from private land: *Kendall v. Post*, 8 Or. 141.

Has exclusive jurisdiction in matters pertaining to passing title to personalty of deceased persons: *Winkle v. Winkle*, 8 Or. 193.

Jurisdiction of County Court to sell realty on administration of estate depends upon the sufficiency of the petition: *Wright and Jones v. Edwards*, 10 Or. 298.

The petition must strictly pursue the statute, and jurisdiction must appear affirmatively therefrom: *Id.*

County Court has exclusive jurisdiction in the first instance to grant or revoke letters of administration: *Ramp v. McDaniel*, 12 Or. 108.

Its probate powers are not created by statute: *Id.*

## 5. JUSTICE OF THE PEACE.

Statute increasing justice's jurisdiction to \$250 is constitutional: *Noland v. Costella*, 2 Or. 57.

A city recorder may be given *ex officio* jurisdiction as justice of the peace within city limits: *Ryan v. Harris*, 2 Or. 175; *Craig v. Mosier*, 2 Or. 323.

Jurisdiction of committing magistrate may be inquired into on return of writ of *habeas corpus*: *Norman v. Zieber*, 3 Or. 197.

**Jurisdiction (continued).**

Of justice, continues after being once obtained over subject-matter, until final disposition: Knapp v. King, 6 Or. 245.

Having rendered judgment void for want of proper service, justice may issue *alias* summons: Id.

Statute creating offense, and affixing penalty to be recovered by action before justice, confers exclusive jurisdiction on Justices' Courts: Multnomah County v. Knott, 6 Or. 279.

Justice has jurisdiction to exclusion of Circuit Court in forcible entry and detainer: Thompson v. Wolf, 6 Or. 308.

Justice has jurisdiction when service of summons is had in the county, although not in his precinct: Taylor v. Jenkins, 11 Or. 274.

When the title to real property comes in question in Justice's Court, jurisdiction is ousted: Sweek v. Galbreath, 11 Or. 516; Aikin v. Aikin, 12 Or. 203.

The test of the jurisdiction of a justice of the peace is the sum recovered, not the sum claimed: Bagley v. Carpenter, 2 W. T. 19, overruling Ebey v. Engle and Hill, 1 W. T. 72.

**6. OTHER TRIBUNALS AND OFFICERS.**

Where an officer is known and recognized as having authority, the court will presume he acted within his jurisdiction, where the verification of a pleading was taken before him: Dennison v. Story, 1 Or. 272.

Jurisdiction of person administering oath must appear in his certificate: Blanchard v. Bennett, 1 Or. 328.

Police judge may be given powers of justice within the city, but cannot be limited to criminal cases: State v. Wiley, 4 Or. 184.

His jurisdiction is identical with justice in civil as well as in criminal cases: Id.

Jurisdiction of police judge of the city of Portland: Id.; Portland v. Denny, 5 Or. 160.

Territorial Probate Court was a court of inferior jurisdiction: Farley v. Parker, 6 Or. 105.

**7. PARTICULAR CASES.**

Surveyor-general has, and courts have not, power to settle boundaries of public lands: Woodsides v. Rickey, 1 Or. 108; Lee v. Simonds, 1 Or. 158.

**Jurisdiction (continued).**

Where settler is in possession, courts can protect his claim from invasion: *Id.*; *Colwell v. Smith*, 1 W. T. 92  
In such case the court will exercise jurisdiction without entertaining the objection that the claim under the Donation Act is not in "compact" form: *Lee v. Simonds*, 1 Or. 158.

Courts will not entertain proceedings arising out of facts to be determined by land department of the United States: *Moore v. Fields*, 1 Or. 317; *Colwell v. Smith*, 1 W. T. 92.

Petition of householders and legal notice are jurisdictional facts in laying out highway: *Thompson v. Multnomah County*, 2 Or. 34; *Johns v. Marion County*, 4 Or. 46.

Larceny may be punished by the courts of any county, where the goods are carried by the thief: *State v. Johnson*, 2 Or. 115.

State courts may be given authority to punish offense of having counterfeiting tools in possession: *State v. Brown*, 2 Or. 221.

Jurisdictional facts need not be recited in warrant for arrest in civil cases: *Norman v. Zieber*, 3 Or. 197.

Jurisdiction on arrest, in civil cases, depends on affidavit, and, if absent or insufficient, arrest is void: *Id.*

Notice of contest of election, jurisdictional: *Myers v. Warner*, 3 Or. 212.

Orders of sale of property in probate proceeding, reciting jurisdiction, are presumed true: *Russell v. Lewis*, 3 Or. 380.

Terminal points must be described with certainty in petition for county road, or no jurisdiction: *Johns v. Marion County*, 4 Or. 46.

Locality of lost stake may be ascertained as well in law as in equity: *Lewis v. Lewis*, 4 Or. 177.

Recital in record of posting of notices to the satisfaction of court in opening road insufficient, and the record must show the facts: *State v. Officer*, 4 Or. 180.

Judgment roll showing want of jurisdiction, proper evidence to dispute administrator's sale: *Gilmore v. Taylor*, 5 Or. 89.

On application for leave to issue execution on a dormant judgment, the same presumption as upon collateral attack: *Strong v. Barnhart*, 6 Or. 93.



**Jurisdiction (continued).**

Notice of intention of city to improve street is jurisdictional, and, in its absence from the record, the presumption of regularity provided by the charter does not exist: *Van Sant v. Portland*, 6 Or. 395.

Judge in vacation has no jurisdiction to try contempt in disobeying order of the court in term: *State v. McKinnon*, 8 Or. 487.

Jurisdiction in *habeas corpus* is not ousted by admission of prisoner to bail before the return to the writ is made: *Pomeroy v. Lappeus*, 9 Or. 363.

Affidavit is the foundation of jurisdiction in making order for immediate delivery in replevin: *Carlton v. Dixon*, 12 Or. 144.

Exercise of power by a city, to sell real property for delinquent tax, is not an adjudication or the exercise of jurisdiction in a judicial sense: *Dowell v. Portland*, 13 Or. 248.

In laying out streets by a city, all the steps provided by charter are jurisdictional, and must appear regularly taken by the record: *N. P. T. Co. v. Portland*, 14 Or. 24.

This, though charter provides for a presumption of regularity in such matters: *Id.*

Guardians' sales, where the record shows no want of jurisdiction, are not open to collateral attack, if the pleadings do not put the jurisdiction in issue: *Walker v. Goldsmith*, 14 Or. 125.

Homicide on Indian reservation is within federal jurisdiction, and rules of common law govern: *Shapoonmash v. United States*, 1 W. T. 188.

Marine torts, committed on tide-waters, within the boundaries of a county, are within the jurisdiction of the United States: *Smith v. United States*, 1 W. T. 262.

An offense so committed is also within the jurisdiction of the territorial court: *Id.*

Territorial courts exercise the combined jurisdiction of the District and Circuit Courts of the United States: *Id.*; *Stevens v. Baker*, 1 W. T. 315.

Territorial courts have jurisdiction of a murder committed on San Juan Island, pending the settlement of the United States boundary, when the offense was committed, while the convention for joint occupancy was in

**Jurisdiction** (continued).

force: *Watts v. United States*, 1 W. T. 288; *Watts v. Territory*, 1 W. T. 409.

Venue is jurisdictional in replevin, but if the sheriff's return shows the property is within the court's jurisdiction, the omission in the pleading is corrected: *Stiles v. James*, 2 W. T. 194.

Transcript of record of a Probate Court in Oregon, showing that that court had assumed jurisdiction of certain notes, is *prima facie* evidence that they were in Oregon at the time and within the jurisdiction of such court: *McCoy v. Ayres*, 2 W. T. 203.

**Jury and Jury Trial.** See Criminal Law; Evidence; Practice.

1. GRAND JURY.
  2. RIGHT TO JURY TRIAL.
  3. SUMMONING AND IMPANELING.
  4. RELATIONS OF COURT AND JURY.
  5. INSTRUCTIONS.
  6. CONDUCT AND DELIBERATION.
  7. VERDICT.
1. GRAND JURY.

Presumed duly sworn as to qualifications to serve, from the language of the record: *O'Kelly v. Territory*, 1 Or. 51.

Challenges to panel are abolished in Oregon by statute: *State v. Fitzhugh*, 2 Or. 227.

Objection that an attorney employed to assist the prosecution was present before the grand jury when indictment was found is no ground for reversal after judgment: *State v. Whitney*, 7 Or. 386; *State v. Justus*, 11 Or. 178.

Motion to quash the indictment for illegality of grand jury, not considered on appeal, where the facts are not discovered from the record: *State v. Anderson*, 10 Or. 448.

Fact that defendant appeared as a witness before the grand jury, no ground for reversal: *Id.*

Under the constitution, the grand jury must be drawn from the jurors in attendance at a term of court; an act providing for drawing them before the term is void: *State v. Lawrence*, 12 Or. 297.

**Jury and Jury Trial** (continued).

Indictment found by such grand jury is invalid, and judgment of conviction thereon bad: *Id.*

Where the record shows the impaneling of grand jury void, court should stay the proceedings as soon as its attention is directed thereto: *Yelm Jim v. Territory*, 1 W. T. 63; *Clarke v. Territory*, 1 W. T. 68.

Irregularities having occurred in selection of grand jury, the court is authorized to discharge same, and have sheriff summon sixteen qualified grand jurors from the by-standers: *Id.*

Where the grand jury have been finally discharged, and it is made to appear to the court that the public interests would be promoted by resummoning them, the court may order sheriff to fill the panel from the by-standers, if all the original jurors cannot be found: *Watts v. Territory*, 1 W. T. 409.

Where the records show that the grand jury appeared in open court, and their foreman, in their presence, presented a true bill properly indorsed, it sufficiently appears that the indictment was found by concurrence of at least twelve jurors: *Id.*

Married women residing with their husbands are competent grand jurors: *Rosencrantz v. Territory*, 2 W. T. 267; *Schilling v. Territory*, 2 W. T. 283; *Walker v. Territory*, 2 W. T. 286.

The Code of 1881, prescribing the qualifications of grand jurors, included, besides persons then qualified, those who should afterwards become possessed of the qualifications prescribed: *Id.*

Chapter 183 of Code of 1881 removed the common-law disabilities of a wife as a member of the family, and husband and wife are jointly the head of the family: —*Id.*

The constitution of the grand jury is not impaired by making married women members thereof: *Id.*

**2. RIGHT TO JURY TRIAL.**

By consent, jury trial may be waived, and a referee appointed to take the testimony to be used on the trial before the court at chambers: *Roy v. Horsley*, 6 Or. 382.

Reference, without consent, under section 219, Civil Code,

**Jury and Jury Trial (continued).**

not unconstitutional, in cases which involve the examination of long accounts: *Tribou v. Strowbridge*, 7 Or. 156.

Nor is section 29, chapter 50, Miscellaneous Laws (sec. 4093, Hill's A. L.), concerning assessment by County Court of damages for taking of materials for repair of roads from private lands, unconstitutional: *Kendall v. Post*, 8 Or. 141.

The right, guaranteed by constitution, is the common-law trial by jury, and trial for violating city ordinance is not within the provisions: *Wong v. Astoria*, 13 Or. 538.

No deprivation of the right that party cannot obtain jury in an inferior court, if provision is made for jury trial on appeal: *Id.*

Parties cannot claim right to jury trial in divorce cases: *Madison v. Madison*, 1 W. T. 60.

There being no waiver of jury trial, the court has no authority to try an action in which an issue of fact is made: *Johnson v. Goodtime*, 1 W. T. 484.

No right of jury trial in admiralty in a libel case: *Phelps v. Steamship City of Panama*, 1 W. T. 518.

Supplemental proceedings under the Code serve the end of a creditor's bill, and therefore are to be heard and determined by the court without jury: *Murne v. Schwabacher Bros. & Co.*, 2 W. T. 130.

**3. SUMMONING AND IMPANELING.**

Selection of jury for special term under statute: *O'Kelly v. Territory*, 1 Or. 51.

Presumption that jury was regularly impaneled: *Id.*

Calling of jury from list, instead of drawing from box, not error sufficient to reverse, where it appears that all the regular panel was so called and exhausted: *Hart v. Territory*, 1 Or. 122.

After discharge of regular panel, court cannot summon new jury against the will of either party: *Mosseau v. Veeder*, 2 Or. 113.

After a jury had been challenged peremptorily, no error to allow challenge to be withdrawn before next juror called: *Garrison v. Portland*, 2 Or. 123.

Resident and tax-payer in city not competent juror in damage case against city: *Id.*



**Jury and Jury Trial** (continued).

Nor in action to lay out street and assess damages and benefits: *Portland v. Kamm*, 5 Or. 362.

Whether the sustaining or overruling challenge for actual bias is reviewable on appeal, *quære*; certainly not unless all the testimony is in the record: *State v. Brown*, 7 Or. 186.

Who is a by-stander: *Id.*

Objection to juror as not a citizen is waived by failing to challenge at proper time: *State v. McDonald*, 8 Or. 113.

Challenge for actual bias cannot be considered on appeal, unless bill of exceptions shows all the evidence adduced: *State v. Tom*, 8 Or. 177; *Hayden v. Long*, 8 Or. 244; *McAllister v. Territory*, 1 W. T. 360.

Objection that a juror is drawn from a particular panel is an objection to the panel: *State v. Dale*, 8 Or. 229.

Where a full panel is not in attendance, and more than enough to fill the panel are summoned, the objection should be made that a particular juror is not properly summoned: *Id.*

Challenges to the panel have been abolished: *State v. Fitzhugh*, 2 Or. 227; *State v. Dale*, 8 Or. 229.

Omission of justice to swear jury waived by proceeding to trial and judgment without objection: *Griffin v. Pitman*, 8 Or. 342.

That a juror had once been convicted of crime is waived by not challenging at proper time: *State v. Powers*, 10 Or. 145.

Actual bias is to be determined by the court in the exercise of a sound discretion: *State v. Saunders*, 14 Or. 300.

Reading newspaper account, or general rumor, though leaving juror with an opinion such that it would require evidence to remove, does not necessarily disqualify: *Id.*

The act of the legislature assigning Pierce County to the Second Judicial District, from which the juror is drawn, does not divest the prisoner of any rights: *Leschi v. Territory*, 1 W. T. 13.

Such enlargement of venue is but an enlargement of Pierce County: *Id.*

Record showing the jury was "duly sworn" shows that the proper oath was administered: *Id.*

**Jury and Jury Trial** (continued).

Objection to the jury is waived if not taken at the time of impaneling the jury: *Clarke v. Territory*, 1 W. T. 68.

Juror absent from the territory for two years, with fixed intention of returning, is a resident, and qualified: *Id.*

The fact that he voted in another state would not establish his residence out of the territory against his sworn statement of residence and intention: *Id.*

In case of a subdistrict composed of more than one county, the statute requires, upon proper motion and affidavit, the exclusion of jurors from the particular county: *McAllister v. Territory*, 1 W. T. 360.

Adding the words, "and the law as given by the court," to the statutory oath, is not error, since the jury is bound to accept the law as given by the court: *Hartigan v. Territory*, 1 W. T. 447; *Leonard v. Territory*, 2 W. T. 381.

Panel of petit jury having been discharged, court is authorized to summon a jury to try the cause: *Thompson v. Territory*, 1 W. T. 547.

Jury may be impaneled after the first three weeks of the term, and the statute providing that all jury trials shall be within the first three weeks of the term is repealed: *Id.*

The form of oath in this case did not differ materially from that prescribed by the statute, but the better practice is to follow the formula adopted by the legislature: *Leonard v. Territory*, 2 W. T. 381.

**4. RELATION OF COURT AND JURY.**

Intention of maker of a writing is a question for the court; if the writing is a part of a transaction consisting of extrinsic facts, the whole evidence is for the jury: *Winter and Lattimer v. Norton*, 1 Or. 42.

Whenever there is any evidence tending to prove a fact, the jury must pass upon it; but if there is no evidence tending to prove the fact, the court may so charge: *Latshaw v. Territory*, 1 Or. 140; *State v. Garrand*, 5 Or. 216; *State v. Whitney*, 3 Or. 386; *Briscoe v. Jones*, 10 Or. 63; *Smith v. United States*, 1 W. T. 262.

Reasonableness of appearances, to justify homicide on ground of self-defense, is a question for jury: *Goodall v. State*, 1 Or. 333.

**Jury and Jury Trial** (continued).

Issues of fraud and mismanagement of directors of corporation submitted to jury in an equity suit: *Hedges v. Paquett*, 3 Or. 77.

Necessity for mooring a boom to the bank of private stream, in an action for trespass, is a question for the jury: *Weise v. Smith*, 3 Or. 445.

Question whether a sale was fraudulent when personal property was left with vendor is a question for jury: *Moore v. Floyd*, 4 Or. 102; *McCully v. Swackhamer*, 6 Or. 438.

Question for jury whether contract for delivery of sheep had been complied with under the circumstances: *Southwell v. Breezley*, 5 Or. 143.

Probable cause in malicious prosecution; province of court and jury: *Glaze v. Whitley*, 5 Or. 164.

Whether statements made by the assured to life insurance company, contained in his written application for insurance, are warranties or representations is to be determined by the court, and not left to the jury: *Buford v. N. Y. Life Ins. Co.*, 5 Or. 334.

Presumption of life or innocence affecting legality of a marriage, duty of court and jury: *Murray v. Murray*, 6 Or. 17.

Construction of a writing as evidence of an agreement is for the court, not the jury: *State v. Moy Looke*, 7 Or. 54; *Tolmie v. Dean*, 1 W. T. 46.

In equity cases, when issues may be submitted to a jury, and the effect of the verdict: *De Lashmutt v. Everson*, 7 Or. 212; *Swegle v. Wells*, 7 Or. 222.

The degree of the crime as well as the fact of guilt must be left to the jury: *State v. Grant*, 7 Or. 414.

Jury may judge of the genuineness of a pretended copy of a lost instrument, when the making of the instrument is a fact in issue: *Rosendorf v. Hirschberg*, 8 Or. 240.

Construction and effect of deeds in evidence must be determined by the court: *Johnson v. Shively*, 9 Or. 333.

Privileges and duty of attorneys in addressing the jury; control of the court: *Tenny v. Mulvaney*, 8 Or. 513; *State v. Lee Ping Bow*, 10 Or. 27; *Long and Spaur v. Lander*, 10 Or. 175; *State v. Anderson*, 10 Or. 448; *State v. Abrams*, 11 Or. 169.

**Jury and Jury Trial (continued).**

Relation and province of court and jury in determining question of negligence: *Walsh v. Oregon R'y & Nav. Co.*, 10 Or. 250.

Modification of contract of carriage by express company, by changing directions indorsed on package, a question for the jury: *Bennett v. Northern Pacific Express Co.*, 12 Or. 49.

Jury must determine the facts, and the court cannot assume as proved facts that should be left to the jury: *State v. Grant*, 7 Or. 414; *State v. Mackey*, 12 Or. 154; *Yarnberg v. Watson*, 13 Or. 11.

Question whether an incompleated boat is a "vessel" is for the jury, under proper instruction and definition by the court: *Yarnberg v. Watson*, 13 Or. 11.

"Frequenting" an opium den would require more than one visit; how many, it seems, would be a mixed question of law and fact for the jury: *State v. Ah Sam*, 14 Or. 347.

The existence of an agent's authority is a question of fact; what he may do by virtue thereof is a question of law: *Glenn v. Savage*, 14 Or. 567.

Whether an agent is duly authorized is not a question for the jury: *Id.*

The existence and terms of a treaty should not be submitted to the belief of the jury: *Roberts v. Lucas*, 1 W. T. 205.

**5. INSTRUCTIONS.**

No error to refuse to instruct on a point to which there is no evidence: *Latshaw v. Territory*, 1 Or. 140; *State v. Glass*, 5 Or. 73; *Glaze v. Whitley*, 5 Or. 164; *State v. Brown*, 7 Or. 186; *Doctor Jack v. Territory*, 2 W. T. 131.

Jury instructed that plaintiff was entitled to his whole damages, or nothing: *Heath v. Glisan*, 3 Or. 64.

Not to compromise against convictions of truth: *Boydston v. Giltner*, 3 Or. 118.

Jurors are not at liberty to disregard the law under belief that they thus can do justice: *Davis v. Mason*, 3 Or. 154.

Right to have instructions given may be limited by reasonable rules of court: *Carney v. Barrett*, 4 Or. 171.



**Jury and Jury Trial** (continued).

In what manner court may instruct jury to bring in verdict in certain form: *Farley v. Parker and Sutherland*, 4 Or. 269.

Abstract propositions of law, or hypothetical case on which the jury will not have to pass, need not be given, and refusal no error: *Shattuck v. Smith*, 5 Or. 125; *Espy v. Fenton*, 5 Or. 423; *State v. Brown*, 7 Or. 186; *Rohr v. Isaacs*, 8 Or. 451; *Schmieg v. Wold*, 1 W. T. 472.

Court is justified in instructing the jury that there is no evidence on a certain point: *Latshaw v. Territory*, 1 Or. 140; *State v. Garrand*, 5 Or. 216; *State v. Whitney*, 7 Or. 386; *Briscoe v. Jones*, 10 Or. 63; *Smith v. United States*, 1 W. T. 262.

Permitting jury to take written instructions to jury-room, condemned as bad practice: *Smith v. Lownsdale*, 6 Or. 78.

But in Washington Territory it is not error to allow them to do so: *Edwards v. Territory*, 1 W. T. 195.

Court may append explanation in writing to instruction requested: *Knapp v. King*, 6 Or. 243.

Error to submit a question of fact to which there is no evidence: *Morris v. Perkins*, 6 Or. 350; *Hayden v. Long*, 8 Or. 244; *Marx v. Schwartz*, 14 Or. 177; *Breon v. Henkle*, 14 Or. 494; *Glenn v. Savage*, 14 Or. 567.

Refusal to give special instruction substantially included in general charge given, no error: *State v. Brown*, 7 Or. 186.

Not error to omit to instruct on question pertinent, without the attention of the court is called to the matter: *Page v. Finley*, 8 Or. 45; *Hurst v. Burnside*, 12 Or. 520.

Refusal to give instructions asked not presumed error; record must show them to have been proper; no error to refuse, when not pertinent: *Richards v. Fanning*, 5 Or. 356; *Rosendorf v. Hirschberg*, 8 Or. 240; *City of Seattle v. Buzby*, 2 W. T. 25.

Instruction upon abstract questions not relevant, though erroneous, not ground for reversal where the record justifies the inference that no injury was occasioned: *Salmon v. Olds and King*, 9 Or. 488; *Yelm Jim v. Territory*, 1 W. T. 63.

**Jury and Jury Trial** (continued).

Otherwise, where it manifestly tends to mislead the jury as to the real issues: *Willis v. Or. R'y & Nav. Co.*, 11 Or. 257; *Breon v. Henkle*, 14 Or. 494.

An erroneous instruction without prejudice is no ground for reversal: *Salmon v. Olds and King*, 9 Or. 488; *Briscoe v. Jones*, 10 Or. 63; *Strong v. Kamm*, 13 Or. 172; *Brown Bros. & Co. v. Forest*, 1 W. T. 201.

Where there are several distinct issues, it is error to instruct to find a verdict in favor of one party if the jury determine a particular one of the issues in his favor: *Kearney v. Snodgrass and Minor*, 10 Or. 181.

Giving or refusing to give instructions not presumed error, where bill of exceptions does not purport to show all the evidence: *Richards v. Fanning*, 5 Or. 356; *State v. Lee Yan Yan*, 10 Or. 365; *Yelm Jim v. Territory*, 1 W. T. 63; *Brown Bros. & Co. v. Forest*, 1 W. T. 201; *Thompson v. Territory*, 1 W. T. 548; *Or. R'y & Nav. Co. v. Galliher*, 2 W. T. 70.

Objection to generality of instruction applicable to some of the issues, as to burden of proof, not being made, it is presumed on appeal to have been applied to proper issues only: *Rogers v. Wallace*, 10 Or. 387.

Instructions as to the effect of a written contract are to be reviewed by an examination of the writing: *Id.*

No error to refuse an instruction asked, if jury are properly instructed on same subject: *State v. Anderson*, 10 Or. 448; *Seattle v. Buzby*, 2 W. T. 25; *Brewster v. Baxter*, 2 W. T. 135.

The entire charge of the court must be considered to ascertain the meaning and effect of any particular portion excepted to: *Id.*; *Brown v. Forest*, 1 W. T. 201.

Error to instruct a jury not to regard mere slight variances not affecting the credit of witnesses: *State v. Swayze*, 11 Or. 357.

Irrelevant instructions must be properly excepted to, or there is no ground for reversal: *Kearney v. Snodgrass*, 12 Or. 311; *Brown Bros. & Co. v. Forest*, 1 W. T. 201; *Smith v. United States*, 1 W. T. 262.

How exceptions should be taken: *Richards v. Fanning*, 5 Or. 356; *Murray v. Murray*, 6 Or. 17; *Kearney v. Snodgrass*, 12 Or. 311.

**Jury and Jury Trial** (continued).

Court cannot instruct jury to bring in a certain verdict:

Smith v. Shattuck, 12 Or. 362; State v. Grant, 7 Or. 414; State v. Mackey, 12 Or. 154.

Instruction assuming a fact which should be left to the jury is error: Yarnberg v. Watson, 13 Or. 11.

Where two contracts are in evidence, an instruction asked, applicable to one of them, ignoring the existence of the other, is properly refused: Krewson & Co. v. Purdom, 13 Or. 563.

Instruction outside of the issues, but in favor of the party complaining of it, is no ground for reversal: Moorhouse v. Donaca, 14 Or. 430.

Where a fact has been established on the trial beyond controversy, the court may assume it as a fact in the case: Edwards v. Territory, 1 W. T. 195.

Unless evidence be given on a fact put in issue by the pleadings, no occasion arises for instruction concerning the same: Brown Bros. & Co. v. Forest, 1 W. T. 201.

Statement by the judge in giving instructions that a certain issue "is the important point in the case, in fact the only point," taken in connection with other parts of his charge, could not have misled the jury: Schmieg v. Wold, 1 W. T. 472.

No ground for reversal that an instruction was not given in the language asked, when such failure has not worked injury: Seattle v. Buzby, 2 W. T. 25.

Incorrect special instruction is not cured by correct general instruction on the same subject: Baxter v. Waite, 2 W. T. 228.

If the court erred in admitting certain evidence, but in the charge to the jury withdrew the evidence from their consideration, the error was cured: P. S. I. Co. v. Worthington, 2 W. T. 472.

**6. CONDUCT AND DELIBERATION.**

Affidavits of jurors will not be received to impeach their verdict: Cline v. Broy, 1 Or. 89; Newby v. Territory, 1 Or. 163; Or. Cas. R. R. Co. v. Or. Steam Nav. Co., 3 Or. 178.

Duties of jurors in viewing premises stated: Or. Cas. R. R. Co. v. Baily, 3 Or. 164.

Too late after verdict to complain that jury did not have

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full view: *Or. Cas. R. R. Co. v. Or. Steam Nav. Co.*, 3 Or. 178.

Permitting jury to take written instructions to the jury-room, condemned as bad practice: *Smith v. Lownsdale*, 6 Or. 78. See *Edwards v. Territory*, 1 W. T. 195.

Purchasing newspaper by jurymen in criminal case, not containing anything improper in regard to the case, does not prejudice the defendant's rights: *State v. Brown*, 7 Or. 186.

Omission to provide for the presence of the accused or his counsel when jury view the premises in a homicide case is no error, where the privilege was not asked: *State v. Ah Lee*, 8 Or. 214.

A ruling of the trial court refusing new trial on account of a juror's drinking intoxicating liquor during the trial will not be considered on appeal: *State v. Becker*, 12 Or. 318.

Attention of the court must be called to improper comments by a party in the presence of a juror for the objection to be available on appeal, and refusal to grant new trial therefor is not reviewable: *Tucker v. Flouring Mills Co.*, 13 Or. 28.

Jury may take written charge and the statute to the jury-room: *Edwards v. Territory*, 1 W. T. 195.

Not error to place the jury in charge of a sworn officer of the court, who has been a witness on the trial: *Id.*

Allowing one or more jurors to retire from the jury-room for a necessary purpose, under supervision of the officer, is not regarded as a separation of the jury: *Id.*

Verdict arrived at by resort to chance or lot is contrary to the statute: *Goodman v. Cody*, 1 W. T. 329.

But resorting to arithmetical average as preliminary means of ascertaining the amount, which is afterwards agreed on, is not misconduct, such as should set the verdict aside: *Id.*

The word "chance" in the statute is used in its popular sense, and has not technical meaning: *Id.*

While separation of jury, with consent of the accused and his counsel, is of doubtful propriety in criminal cases, it is not error: *Hartigan v. Territory*, 1 W. T. 447.

Where the accused and his counsel gave consent to such



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separation, they should be estopped from objecting thereto on appeal: *Id.*

Jury may be permitted to carry a hat and garment, introduced in evidence, to the jury-room: *Doctor Jack v. Territory*, 2 W. T. 101.

The word "papers" in the statute allowing papers admitted in evidence to be taken by the jury to the jury-room is to be interpreted to include exhibits generally: *Id.*

**7. VERDICT.**

Return of verdict into court, recited by the record, is presumed to mean that it was rendered in open court: *O'Kelly v. Territory*, 1 Or. 51.

Accused presumed to be present in court when verdict was returned, when record is silent: *Id.*

Verdict cannot be impeached by affidavit of jurors: *Cline v. Broy*, 1 Or. 89; *Newby v. Territory*, 1 Or. 163; *Or. Cas. R. R. Co. v. Or. Steam Nav. Co.*, 3 Or. 178.

Jury need not assess the value of the property stolen in a larceny case when the property is alleged to be of a specific value: *Howell v. State*, 1 Or. 241.

Verdict in forcible entry and detainer case, held sufficient: *Altree v. Moore*, 1 Or. 350.

Recommendation of defendant to mercy is not inconsistent with verdict of guilty: *State v. Fitzhugh*, 2 Or. 227.

In controverted issues of fact, the finding by the verdict is presumed correct: *Bybee v. Burbank*, 2 Or. 295.

Special verdict defined to be a finding of the facts only, leaving the judgment to the court: *Dray v. Crich*, 3 Or. 298.

General verdict, with inconsistent limitations added, will not stand as general verdict: *Id.*

Every material allegation of complaint presumed found true by jury, after general verdict in favor of the plaintiff: *Torrence v. Strong*, 4 Or. 39.

Error to receive verdict in absence of the defendant in a felony case: *State v. Spores*, 4 Or. 198.

Verdict in action to lay out street and assess damages and benefits must state each separately: *Portland v. Kamm*, 5 Or. 362.

When special findings are inconsistent with general ver-

**Jury and Jury Trial** (continued).

dict, former control: *Rolfes v. Russel*, 5 Or. 400; *Wiley v. Morrow*, 1 W. T. 474.

In equity cases on appeal, verdict is not to be disregarded, unless clearly erroneous: *De Lashmutt v. Everson*, 7 Or. 212; *Swegle v. Wells*, 7 Or. 222.

Verdict is presumed as broad as the issues to be passed upon: *Reed v. Gentry*, 7 Or. 497.

In replevin, a verdict for damages only, without finding ownership or value, will not sustain judgment: *Jones v. Snider*, 8 Or. 127.

Where statute requires special findings, general verdict is not presumed to include: *Id.*

Where two defendants, jointly charged with conversion, answer, and a general verdict against them is found, judgment must be given against both: *Cauthorn v. King*, 8 Or. 138.

And in such case, if but one of the defendants has appealed from Justice's Court, the Circuit Court will have jurisdiction of both, if both appear and defend, and a general verdict binds both: *Id.*

Submission of special questions discretionary with the court, and may be withdrawn at any time before verdict: *Rohr v. Isaacs*, 8 Or. 451.

Verdict of a sheriff's jury under section 284 of the Code (sec. 287, Hill's A. L.), operates as a full indemnity to him as against the claimant of goods taken on execution: *Remdall v. Swackhamer*, 8 Or. 502; *Capital Lumbering Co. v. Hall*, 9 Or. 93; *Hexter v. Schneider*, 14 Or. 184.

After verdict against him, claimant cannot maintain replevin against the sheriff: *Id.*

Informal statement of facts in pleading is cured by verdict: *Houghton and Palmer v. Beck*, 9 Or. 325; *Aiken Coolidge*, 12 Or. 244; *Andros v. Childers*, 14 Or. 447.

But verdict does not supply a fact not pleaded: *Weiner v. Lee Shing*, 12 Or. 276.

Verdict evidently finding the fact correctly, error in submitting a question to the jury, which was within the province of the court, will not avail on appeal: *Johnson v. Shively*, 9 Or. 333.

Where the error in the amount of the verdict was considerable and ascertainable, on appeal the judgment

**Jury and Jury Trial (continued).**

was not reversed, on respondent's deducting the excess and paying costs: *T. & McK. v. M. & B.*, 9 Or. 405.

In criminal case, it is not necessary that prisoner's counsel be present when the verdict is received: *State v. Lee Ping Bow*, 10 Or. 27.

Record reciting presence of accused at beginning of trial, and no adjournment being noted, it is presumed he was present when verdict was rendered: *State v. Cartwright*, 10 Or. 193.

Form of verdict in action to condemn land for railroad: *Or. R'y Co. v. Bridwell*, 11 Or. 282.

In criminal actions for rioting: *State v. Louey and Loo Wan*, 11 Or. 326.

In replevin, failure to allege place where the goods were taken is cured by verdict: *Kirk v. Matlock*, 12 Or. 319.

Court has no power to direct a jury to bring in a particular verdict: *Smith v. Shattuck*, 12 Or. 362.

Excessive verdict for damages, no ground for reversal on appeal; and refusal of trial court to set aside such verdict is not reviewable: *Nelson v. Or. R'y etc. Co.*, 13 Or. 141.

Verdict in replevin in favor of party in possession need not assess value: *Prescott v. Heilner*, 13 Or. 200.

In replevin, failure to find damages does not vitiate a verdict; it is presumed that the jury found no damage sustained: *Id.*

General verdict returned, in which a line is drawn through the name of one of the defendants, in the title of the cause, is good as against the other defendant: *French v. Cresswell*, 13 Or. 418.

Refusal of court to submit special questions for findings thereon is not reviewable, and is discretionary: *Swift v. Mulkey*, 14 Or. 59.

Verdict of a jury called by officer to try the question of title of goods attached operates as a protection to the officer, but does not conclude the claimant from bringing replevin against purchaser: *Hexter v. Schneider*, 14 Or. 180.

Defective statement of a good defense will be aided by verdict: *Andros v. Childers*, 14 Or. 447.

Some counts in indictments being good and some bad,

**Jury and Jury Trial** (continued).

verdict is presumed to be based on the good counts: *Leschi v. Territory*, 1 W. T. 13.

From the record, prisoner presumed to have been present when verdict returned: *Id.*

Under indictment for crime of high grade, verdict may be found of guilty of a lesser crime necessarily included: *Clarke v. Territory*, 1 W. T. 68.

The court is always deemed open for purpose connected with the jury, and can receive verdict after adjournment and before the meeting of the court at the hour specified in the order of adjournment: *Edwards v. Territory*, 1 W. T. 195.

Verdict arrived at by resort to chance or lot is contrary to the statute: *Goodman v. Cody*, 1 W. T. 329.

After having retired a second time for deliberation upon corrected instructions, given by the court after the jury first returned into court with a verdict, but before such verdict was received by the court, the jury is presumed to have returned their verdict pursuant to the corrected instructions: *Doctor Jack v. Territory*, 2 W. T. 101.

**Justice of the Peace.** See Appeal and Error; Forcible Entry and Detainer; Jurisdiction.

Statute of 1862, increasing jurisdiction from \$100 to \$250, constitutional: *Noland v. Costello*, 2 Or. 57.

A justice must act as court of inquiry only, and bind over defendant to Circuit Court, in felony cases: *Williams v. Shelby*, 2 Or. 144.

City recorder may be made *ex officio* justice of the peace within city limits: *Ryan v. Harris*, 2 Or. 175.

City recorder of Salem is *ex officio* justice of the peace within city limits: *Craig v. Mosier*, 2 Or. 323.

But has no jurisdiction where process is served outside the city: *Id.*

Appeal does not lie from judgment less than twenty dollars, though greater sum is in controversy: *Stoll v. Hoback*, 2 Or. 225.

Justice need not order repaid to judgment debtor "earnings" exempt, voluntarily paid in by a garnishee: *Opitz v. Winn*, 3 Or. 9.

Need not make an order not directly authorized by statute: *Id.*



**Justice of the Peace** (continued).

Filing transcript from Justice's Court on appeal is not sufficient docketing of judgment to allow execution against land: *Chapman v. Raleigh*, 3 Or. 34.

Certificate of justice to copy of complaint, as a true copy thereof, sufficient to authorize its service, with summons: *Marooney v. McKay*, 3 Or. 372.

Transcript, and not mere abstract of judgment, must be filed with county clerk to give lien on realty: *Dearborn v. Patton*, 4 Or. 58.

Police judge of Portland may be given powers of justice in civil and criminal cases within the city: *State v. Wiley*, 4 Or. 184.

City recorder of Corvallis is *ex officio* justice of the peace, and appeal lies from his judgments: *Sellers v. Corvallis*, 5 Or. 273; *Corvallis v. Stock*, 12 Or. 391.

Jurisdiction once obtained over the subject-matter continues until final disposition: *Knapp v. King*, 6 Or. 243.

After rendering judgment void for defect in obtaining jurisdiction of person of defendant, justice may issue *alias* summons, and proceed to judgment: *Id.*

May, after rendering but not recording judgment at length, subsequently record the same: *Id.*

Statute creating an offense and affixing penalty to be recovered in Justice's Court gives justice exclusive jurisdiction of the offense: *Multnomah Co. v. Knott*, 6 Or. 279.

Justice has jurisdiction in forcible entry and detainer to exclusion of Circuit Court: *Thompson v. Wolf*, 6 Or. 308.

May take case under advisement without adjourning to a day certain, and subsequently render judgment: *Saunders v. Pike*, 6 Or. 312.

Judgment entered as of the 6th, when rendered on the 11th of April, is not void in the absence of fraud: *Id.*

Omission to swear jury is waived by parties proceeding to trial and judgment without objecting: *Griffin v. Pitman*, 8 Or. 342.

No right after rendering judgment to set it aside and grant new trial: *Id.*

Judgment rendered for want of answer, docket not showing that defendant was given an hour to appear, will be reversed on writ of review: *Gaunt v. Perkins*, 8 Or. 354.

**Justice of the Peace (continued).**

Oral reply to counter-claim having been made, but not entered in docket, Circuit Court may on appeal allow written reply presenting same issues: *Rohr v. Isaacs*, 8 Or. 451.

Appeal does not lie from judgment of city recorder of Lafayette when sitting as recorder, as distinguished from justice of the peace: *Lafayette v. Clark*, 9 Or. 225.

Strict formality is not required in allegations in pleadings before justice: *Houghton and Palmer v. Beck*, 9 Or. 325.

Justice's Court has jurisdiction, though service is had out of the precinct, but within his county, without regard to the place of residence of the parties: *Taylor v. Jenkins*, 11 Or. 274.

Summons may be served by constable anywhere in the county: *Id.*

Justice has power to adjudge costs against defendant found guilty of a misdemeanor, and imprison him in default of payment of the same: *Crowley v. State*, 11 Or. 512.

When the title to real property comes in question by defense or plea, justice is ousted of jurisdiction: *Sweek v. Galbreath*, 11 Or. 516; *Aiken v. Aiken*, 12 Or. 203.

Where plaintiff, instead of justice, makes the indorsement of directions to the officer on an affidavit for immediate delivery in replevin, the bond is not void; sureties are liable: *Carlton v. Dixon*, 12 Or. 144.

Justice has jurisdiction in a proper case in replevin, irrespective of the place of the taking: *Kirk v. Matlock*, 12 Or. 319.

Has no jurisdiction to revive a justice's judgment to make it a lien on real property: *Glaze v. Lewis*, 12 Or. 347.

Judgment cannot be set aside in equity for intimidation of witnesses of a party during trial by a casual broil occurring during the trial in the Justice's Court: *Scoggin v. Hall*, 12 Or. 372.

The amount claimed, and not the amount recovered, is the test by which the jurisdiction of a justice of the peace is determined: *Ebey v. Engle and Hall*, 1 W. T. 72; *contra*, *Bagley v. Carpenter*, 2 W. T. 19.

Records of justice being destroyed before transcript was certified on appeal, the appellant is entitled to have the

**Justice of the Peace** (continued).

cause docketed in the District Court, to show the facts and supply the missing records: *Mullen v. Mullen*, 1 W. T. 192.

The Justice's Court is not the proper court to supply the destroyed records: *Id.*

On a claim filed in a Justice's Court against S. Baxter & Co., summons issued to S. Baxter and A. M. Brooks, and both appeared and pleaded; held, that the defect of the parties appearing on the face of the claim is waived: *Baxter & Co. v. Scoland and Jensen*, 2 W. T. 86.

Whether the absense of a venue in an affidavit sworn to before a justice is a fatal omission, *quære*: *McCoy v. Ayres*, 2 W. T. 203.

**Kidnaping.**

Acquittal of assault and battery, no bar to prosecution for kidnaping: *State v. Stewart*, 11 Or. 52; S. C., 11 Or. 238.

**Laborers' Liens.** See **Liens.****Laches.**

Motion to amend decree, too late after seventeen months' delay, unless excuse is shown: *Chapman v. Wilber*, 5 Or. 299.

Delay of thirteen years in prosecuting equitable claim, where due diligence is required, with sufficient knowledge to be put on inquiry, is unreasonable: *Weiss v. Bethel*, 8 Or. 522.

When a condition precedent remains unperformed by one party to a contract, laches cannot be imputed to the other party: *Richards v. Snider*, 11 Or. 197.

Where time is not of the essence of the contract, and the plaintiff is not guilty of laches, mere lapse of time will not prevent granting relief by specific performance: *Richards v. Snyder and Crews*, 11 Or. 501.

Delay in obtaining settlement and allowance of bill of exceptions, unless caused by the appellant, will not prejudice his rights: *Ah Lep v. Gong Choy*, 13 Or. 205.

Minor, on coming of age, must attack guardian's sale for fraud or want of jurisdiction within a reasonable time, or he will be presumed to waive all objections: *Walker v. Goldsmith*, 14 Or. 125; *Brazee v. Schofield*, 2 W. T. 209.

**Laches** (continued).

Delay of time in bringing suit to set aside a decree for fraud is usually no bar to relief, unless the party had knowledge of the fraud: *Sedlak v. Sedlak*, 14 Or. 540.

But knowledge, or means of knowledge so that the party ought to have known, make it necessary for party to sue promptly, or be deemed guilty of laches: *Id.*

So, when thirty years have elapsed, and in the mean time the rights of parties have intervened and the party has been enjoying the benefit of the decree, the relief will be barred: *Id.*

**Land Laws.** See Public Lands.

**Landlord and Tenant.** See Forcible Entry and Detainer.

When the day and month, of the beginning of the term of a lease, is left blank, term was held to run from last day of the year: *Huffman v. McDaniel*, 1 Or. 259.

Tenant has no remedy against landlord for injury from ill repair of building, unless landlord has agreed to repair: *Kahn v. Love*, 3 Or. 206.

Tenant cannot make repairs at expense of landlord: *Id.*

Agent in possession for principal has no such possession as to be personally liable for rent under statute: *Stewart v. Perkins*, 3 Or. 508.

Relation of landlord and tenant, express or implied, must be shown in order to sustain action for use and occupation; otherwise, remedy is ejectment: *Espy v. Fenton*, 5 Or. 423.

Lease not describing premises is void for uncertainty, and cannot be aided by parol: *Noyes v. Stauff*, 5 Or. 455?

Leasing for two years by parol, not admissible to prove lease for one year, good under statute of frauds, on failure to prove written lease alleged: *Id.*

Parol lease for life, accompanied by possession and payment of rent, creates a tenancy from year to year, and must be determined by notice to quit: *Garrett v. Clark*, 5 Or. 464.

So, a lease for three years, not in writing: *Williams v. Ackerman*, 8 Or. 405.

Parol agreement subsequent to the leasing, to excuse payment of rent provided in written lease, must have been intended and accepted in lieu of original lease: *Watson v. Janion*, 6 Or. 137.



**Landlord and Tenant** (continued).

Surrender and acceptance thereof extinguish liability to pay rent subsequently: *Bush v. Smith*, 6 Or. 316.

Surrender may be by express consent or implied by law, but will not be implied merely from delivery of keys by tenant to landlord: *Id.*

Accepting possession, and reletting to other tenants, operates as a consent to the surrender: *Id.*

Lease is not a conveyance; it is a chattel interest: *Edwards v. Perkins*, 7 Or. 149.

A covenant for quiet enjoyment is implied in a lease for years: *Id.*

Lease, with right of immediate possession, etc., gives lessee the emblements, unless reserved; and express words add nothing to the right thereto: *Id.*

The rule that a tenant cannot dispute his landlord's title binds the successors of the first tenant: *Jones v. Dove*, 7 Or. 467.

Parol promise, without consideration, for future leasing for term of years, gives promisee no rights, though he has possession obtained without request of promisor: *Pulse v. Hamer*, 8 Or. 251.

Lease reserving part of crop as rent makes landlord and tenant co-owners of crop, and the tenant cannot sell the part so reserved: *Cooper v. McGrew*, 8 Or. 327.

Lessee, under verbal lease for three years, going into possession and paying rent, lease becomes a tenancy from year to year, which can only be terminated by either party by notice: *Williams v. Ackerman*, 8 Or. 405.

Landlord may reserve crops raised by tenant as his property, by the terms of the lease, until rent is paid: *Fox Bros. & Co. v. McKinney*, 9 Or. 493.

Such lease is not a chattel mortgage: *Id.*

In construing such lease, the intention of the parties in regard to such reservation must govern: *Id.*

Destruction of premises by fire does not release obligation to pay rent when: *Harrington v. Watson*, 11 Or. 143.

Where a room in a building is leased, and the building is afterward destroyed, the relation of landlord and tenant ceases: *Id.*

Such tenant, after the building is destroyed, has no right

**Landlord and Tenant** (continued).

to move another building on the land, and hold possession: *Id.*

Complaint in forcible entry and detainer need not aver service of notice to quit: *Chung Yow v. Hop Chung*, 11 Or. 220.

Service of notice to quit may be proved by parol: *Id.*

Lessee may enter, under a valid lease, at any time during the term: *Id.*

Execution of a valid lease is a complete leasing, even before entry: *Id.*

Posting of an offer to lease, which is accepted by a bid in writing, agreed to by the lessor, held a valid leasing: *Id.*

Complaint that D. (a third person) rented to defendant, who promised to pay rental to plaintiff, states a good cause of action: *Schneider v. White*, 12 Or. 503.

Material and substantial alteration of a building by tenant is waste: *Davenport v. Magoon*, 13 Or. 3.

Privilege in lease to alter does not justify tearing down and building a new, though better, building: *Id.*

Defendant, a mere intruder, having had the use of property held by plaintiff under color of title, is liable to the latter for the value of such use: *Blumberg v. McNear & Co.*, 1 W. T. 141.

Lease for a term of years, tenant to make all necessary repairs, damages by the elements excepted, imposes on landlord the obligation to rebuild buildings destroyed by fire: *Hadlan v. Ott*, 2 W. T. 165.

Where in suit by tenant for damages for failure to rebuild in such case the lease is admitted, the tenant is entitled on the pleadings to at least nominal damages: *Id.*

**Land-office of the United States.** See Public Lands.

**Land Patents.** See Public Lands.

**Larceny.**

Verdict need not assess value of the property stolen when the indictment alleges a value: *Howell v. State*, 1 Or. 241.

Offense committed without the state continues and accompanies the stolen property: *State v. Johnson*, 2 Or. 115.

May be tried in any county into which the property is brought by the offender: *Id.*

Larceny from the person includes lesser crime of simple larceny: *State v. Taylor*, 3 Or. 10.

**Larceny (continued).**

Larceny of belt from mill in custody of sheriff under attachment: *State v. Cornelius*, 5 Or. 46.

On compromise of larceny under the statute, no more than the value of the property and expenses can be exacted: *Saxon v. Hill*, 6 Or. 388.

Larceny of horse, saddle, and bridle at same time and place, the property of the same person, is but one offense: *State v. McCormack*, 8 Or. 236.

Conviction on indictment for taking the saddle and bridle bars prosecution for larceny of the horse: *Id.*

Taking overpayment, concealing the mistake, and appropriating the money with intent to defraud the owner, is larceny: *State v. Ducker*, 8 Or. 394.

Indictment using singular for plural verb, but evidently charging all the defendants with the crime, is sufficient: *State v. Lee Ping Bow*, 10 Or. 27.

"Stealing from and on the person," etc., in indictment, "and on" is mere surplusage: *Id.*

Evidence that the person robbed had money, shortly before the alleged theft, of the same amount as was afterwards found on the accused, is admissible: *Id.*

Under section 552 (sec. 1763, Hill's A. L.), indictment alleging that defendant "feloniously took and carried away" is sufficient, without using the word "steal": *State v. Lee Yan Yan*, 10 Or. 365.

Branding and returning to the range cattle apparently ownerless raises no presumption of criminal intent: *State v. Swayze*, 11 Or. 357.

Natural marks on cattle, though serving to identify them, are no indication of the ownership: *Id.*

The only presumption arising from the possession of property recently stolen, is one of fact, not law: *State v. Hale*, 12 Or. 352.

An indictment which charges stealing, at same time and place, a horse, the property of one M., and another horse, the property of —, charges but one offense: *Territory v. Heywood*, 2 W. T. 180.

If such indictment be objectionable as double, the failure to object until after verdict is a waiver: *Id.*

Instruction that, if the name of the owner of the property is unknown to the jury, they may assume that it was

**Larceny** (continued).

unknown to the grand jury at the time the indictment was found, is not error: *Id.*

**Law of the Case.** See *Stare Decisis*.

Legal propositions which have arisen and been decided on former appeal, whether correctly decided or not, become the law of the case, so far as applicable to the facts developed on subsequent trial: *Powell v. D. S. & G. R. R. Co.*, 14 Or. 22.

But the law of the case does not apply to the facts, but only to the law: *Bloomfield v. Buchanan*, 14 Or. 181.

And when new evidence has altered the facts, the law will be applied to the new facts as they appear: *Id.*

**Latent Ambiguity.** See *Evidence*.**Laws of the Territory.** See *Admiralty*; *Constitutional Law*; *Courts*; *Criminal Law*; *Jurisdiction*.**Laws of the United States.** See *Admiralty*; *Constitutional Law*; *Courts*; *Criminal Law*; *Jurisdiction*.**Leases.** See *Landlord and Tenant*.**Legacies.** See *Administration*; *Wills*.

Legatee, being successor in interest in the subject-matter of a suit, may be substituted as plaintiff on death of the latter under section 37 of the Code (sec. 38, Hill's A. L.): *Murray v. Murray*, 6 Or. 26.

Bequest, "to be given to him when he is twenty-two years of age," is a vested legacy, and the legatee's representative takes if he dies before that age: *Warner v. Hembree*, 8 Or. 118.

Bequest of residue of estate to wife for her absolute use and control, etc., during life, held to confer "use," but not the consumption, of the estate: *Leahy v. Cardwell*, 14 Or. 171.

Residue defined; it is ascertained when final account is presented and allowed and residuary legatee is then entitled to take: *Id.*

Such legatee is not chargeable with interest on notes given to the executor for funds belonging to the estate, after final settlement: *Id.*

**Legislature.** See *Constitutional Law*; *Statutes*.**Letters.** See *Evidence*; *Jury* and *Jury Trial*.**Levy.** See *Attachments*; *Executions*, and *Proceedings Supplemental*; *Taxation*.



**Libel.** See Admiralty; Slander and Libel.

**Licenses.** See Dedication; Easements; Liquor Laws.

License of brokers, who are not brokers within the charter of city of Portland: *Portland v. O'Neill*, 1 Or. 218.

Money paid into county treasury for license cannot be recovered in action for money had and received on refusal of the County Court to grant a license: *Trainor v. Multnomah Co.*, 2 Or. 214.

Burden of proof is on the defendant to show that he is licensed, in proceedings against him by indictment: *State v. Cutting*, 3 Or. 260.

House kept for public dancing simply is not a hurdy-gurdy dance-house, requiring a license under the statute of 1864 (sec. 3646, Hill's A. L.): *State v. Tilley*, 9 Or. 125.

Permissive use of a way by a portion of a community is a license, not a dedication: *Smith v. Gardner*, 12 Or. 221.

License by shore-owner to float logs down a stream confers no greater right on licensee than he would have without it if the stream is navigable: *Haines v. Welch*, 14 Or. 319.

**Liens.** See Admiralty; Boats and Vessels; Criminal Law; Judgments; Mortgages; Municipal Corporations.

1. MECHANICS' LIENS.

2. OTHER LIENS.

1. MECHANICS' LIENS.

Repeal of a law by a new law after lien is acquired does not divest the lien: *Steamer Gazelle v. Lake*, 1 Or. 119.

Proceedings to enforce should conform to the new law: *Id.*

Overseer who also performs manual labor is entitled to lien for all his services: *Willamette Falls etc. Co. v. Remick*, 1 Or. 169.

A lien attaches to mill for labor on dam and breakwater belonging thereto: *Id.*

Claims for anything but labor or materials are non-lienable: *Id.*

Complaint must state where and when the labor was performed: *Willamette Falls etc. Co. v. Smith*, 1 Or. 171.

Apportionment of moneys under boat lien law of 1851 among lienors: In the *Matter of Moore*, 1 Or. 179.

Suit for materials under lien law of 1851 must be brought

**Liens (continued).**

within one year: *Willamette Falls etc. Co. v. Perrin*, 1 Or. 182.

What sufficient summons in action to enforce a mechanic's lien: *Willamette Falls etc. Co. v. Riley*, 1 Or. 183.

Rights are fixed by law in force when contract was made; and may be enforced under law existing at the time of suit: *Id.*

Notice of intention to hold lien must state the amount of indebtedness claimed: *Id.*

Lien attaches under the statute at time of commencement of the building: *Id.*

Interest may be included in the demand, and the lien covers whole amount: *Id.*

Lien does not include ground as well as the building, unless complaint alleges defendant owns the same: *Id.*

Lien claimants are estopped from denying notice of a prior unrecorded mortgage recited in owner's title deed: *Holmes v. Ferguson*, 1 Or. 220.

Under act of 1853 lien begins from time of filing notice, and then may relate back to commencement of the building: *Ritchey v. Risley*, 3 Or. 184.

A sale on foreclosure of such lien under the act passes title free from all liens created after the commencement of the work: *Id.*

Proceedings to foreclose must be commenced within one year after filing notice: *Coggan v. Reeves*, 3 Or. 275.

An action to foreclose must commence by filing complaint: *Id.*

Lien-holder made defendant in a suit because subsequent, must still pursue statutory remedy, and foreclose by filing complaint: *Id.*

Complaint should show contract was made with owner or his agent: *Marooney v. McKay*, 3 Or. 372.

Lumber manufacturing corporation cannot hold lien for work done on a building: *D. L. & M. Co. v. W. W. M. Co.*, 3 Or. 527.

Where lien claimed by such corporation was for lumber and labor, and complaint did not segregate, whole lien void: *Id.*

Lien attaches only to building on which the work was done, or the material furnished, and not to others occupied by defendants: *Id.*

**Liens (continued).**

Complaint must allege that notice was filed in pursuance of the statute: *Id.*

The remedy is created in derogation of the common law, and ought to be strictly construed: *Id.*; *Kendall v. McFarland*, 4 Or. 292.

Right to file lien is not assignable, but when perfected it may be assigned: *Brown v. Harper*, 4 Or. 89.

Execution may issue to sell the premises on judgment to enforce lien: *Kendall v. McFarland*, 4 Or. 292.

Liens have priority over all liens after commencement of the building, but statute must be strictly complied with: *Id.*

In action to enforce, it should appear when building was commenced: *Id.*

Judgment is a lien from time it was docketed, when the time the building was commenced does not appear by the judgment roll: *Id.*

Lien for material furnished cannot be enforced against United States revenue cutter in state court: *Goldsmith v. The Revenue Cutter*, 6 Or. 250.

A boat, under the lien law, section 17, chapter 13, Miscellaneous Laws (c. 55, tit. 3, Hill's A. L.), must be a complete vessel: *Northup v. The Pilot*, 6 Or. 297.

Material-men, who furnish material to a person having a contract to build and deliver a part of a boat, have no lien on the boat when completed by the contractors: *Id.*; *Waddell and Miles v. Steamer Daisy*, 2 W. T. 76.

Description in a notice must be as definite as in a deed; notice held insufficient: *Runey v. Rea*, 7 Or. 130.

Lien waived by taking mortgage on same property: *Trullinger v. Kofoed*, 7 Or. 228.

Right of subsequent lienors, on foreclosure of a mortgage on the whole of the premises, to have a building thereon sold and the proceeds applied to their liens: *Inverarity v. Stowell*, 10 Or. 261.

Act of 1874 did not change common-law rule that building erected becomes part of the freehold immediately: *Id.*

Evidence held to sustain finding that notice was served after building was completed: *McGuire v. Logus*, 11 Or. 233.

**Liens (continued).**

Under act of 1874, in the absence of written contract, no lien attached, unless written memorandum of the terms of the contract for the construction is refused: *Tatum v. Cherry*, 12 Or. 135.

Machinist has no lien on building for machinery and repairs, furnished in the usual course of trade, without contract: *Id.*

Lien does not attach to public property, in the absence of express statutory provision: *Lumbering etc. Co. v. School District*, 13 Or. 283.

Cannot be acquired or enforced against public school building: *Id.*

The words "over and above all payments and offsets," used in the statute, need not be quoted in the notice; sufficient if the fact appear that the claim is due and its amount is stated: *Whittier, Fuller, & Co. v. Blakely*, 13 Or. 546; *Baxter v. Smith*, 2 W. T. 97; *contra*, *Wheeler v. Blakely*, 2 W. T. 71; but see *Merchant v. Humeston*, 2 W. T. 433.

Under the Oregon act of 1874, the lien attached when the material is furnished, provided notice to the owner is subsequently given: *Whittier, Fuller, & Co. v. Blakely*, 13 Or. 546.

Privilege of the owner, under section 4 of the act, to deposit with county clerk in case of disputed claims, and so discharge *pro tanto* the lien, is optional with him: *Id.*

Whenever the owner fails or refuses to make such deposit, or pay the claim, notice of which has been given, the lienor has immediate right to sue: *Id.*

Where the work is to be paid for in installments on the completion of specified portions of the contract, a material-man, furnishing material for one such portion, can enforce the same as soon as that portion is complete, without waiting until the whole contract is done: *Id.*

Notice to be filed, after the completion of the building, with the clerk, under section 18 of that act, need not be filed before the action is begun: *Id.*

The object of such notice is to prevent the lien from lapsing on completion of the contract: *Id.*



**Liens (continued).**

Indorsement on the original notice, made by the auditor, of filing and recording, is not competent proof of the recording thereof: *Jewett v. Darlington*, 1 W. T. 601.

Proof that such notice was handed to the auditor after office-hours, with request to record, is not sufficient proof that the same was recorded: *Id.*

Mechanics' lien law of 1877 was intended as a substitute for, and not a continuation of, the act of 1873: *Seattle & W. W. R. R. Co. v. Ah Kow*, 2 W. T. 36.

All rights accrued under the former act are repealed, except as kept alive by the provisions of the latter act, and all remedies to enforce such preserved rights are under the latter act: *Id.*

Unless claims were filed in time and manner prescribed in the act of 1877, for work which ended with repeal of statute of 1873, the liens were lost: *Id.*

Allowance of attorneys' fees for foreclosure of lien: *Id.*

"A lot of saw-logs marked F. and A., now lying in Ebey's slough," is sufficient identification and description of property in the notice: *Wheeler v. Port Blakely Mill Co.*, 2 W. T. 71.

The word "lot" defined; in the absence of proof it will be presumed to include all the logs of that description at the place named: *Id.*

The requirement that the notice shall contain "a statement of the demand and the amount thereof, after deducting as near as possible all just credits and offsets," must be strictly and literally followed: *Id.*

But the substitution of the word "effects" for "offsets" in such notice is a substantial compliance, and is sufficient: *Merchant v. Humeston*, 2 W. T. 433.

The notice is sufficient if it can be determined therefrom the amount of the demand before the deduction of offsets, and what amount remained due after making the deductions: *Baxter v. Smith*, 2 W. T. 97.

Notice describing the buildings as one of seven, situate on two certain lots, and setting forth that the demand is for one seventh of the aggregate work and material furnished in the seven buildings, is void for uncertainty: *Merchant v. Humeston*, 2 W. T. 433.

**Liens (continued).****2. OTHER LIENS.**

The taking of a mortgage for the purchase-money is a waiver of vendor's lien: *Pease v. Kelly*, 3 Or. 417.

Vendor's lien exists only when there is no higher security taken: *Id.*

Purchaser without notice of defect of title has lien for his improvements: *Hatcher v. Briggs*, 6 Or. 31.

Vendor's lien cannot be asserted by person not the vendor, though claiming to have been the real owner: *Kelly v. Ruble*, 11 Or. 75.

*Semble*, that vendor's lien does not exist in Oregon: *Id.*; *contra*, *Gee v. McMillan*, 14 Or. 268.

Innkeeper has lien upon property of his guest, and property put in his possession by his guest, for charges: *Cook v. Kane*, 13 Or. 482.

Property of third person, in hands of guest, is covered by innkeeper's lien, if the latter has no knowledge of the rights of the owner, and the property comes to the innkeeper by virtue of his character as innkeeper: *Id.*

Piano, received by guest in his name, put in the possession of innkeeper by him, is covered by innkeeper's lien, unless the latter had knowledge that another was owner: *Id.*

Vendor's lien for purchase price of land arises in favor of vendor when the vendee fails to give notes in payment, as agreed, but seeks to put the property in his wife's name for the purpose of evading the contract: *Gee v. McMillan*, 14 Or. 268.

Act of 1878 (sec. 3683, Hill's A. L.), giving lien for work bestowed on personal property, is declaratory of the common law, and must be interpreted accordingly: *McDearmid v. Foster & Co.*, 14 Or. 417.

Actual possession, in the absence of special agreement, is essential to such lien: *Id.*; *Hogue v. Sheriff of Lewis County*, 1 W. T. 172.

Where one is employed to cut and stack grain growing on the land of another, he does not acquire a possession such that he can hold lien on the crop: *Id.*

Lien for advances, under a contract for leasing sheep, examined: *Breezley v. Crossen*, 14 Or. 473.

One who harvests and thrashes grain, and puts same in a

**Liens (continued).**

barn on land not belonging to the owner of the grain, may have a lien for his labor thereon: *Hogue v. Sheriff of Lewis Co.*, 1 W. T. 172.

The lien is not divested, though the barn in which the grain was stored by the lienor was not his own, under the circumstances of the case: *Id.*

Vendee may pay existing liens upon chattels bought by him without notice, and offset the amount against the purchase price: *Baker and Hamilton v. McAllister*, 2 W. T. 48.

The lien of a vendor of logs attaches to each log for the contract price per thousand feet, as if separate contract of sale had been made respecting it: *Baxter v. Smith*, 2 W. T. 97.

**Life Insurance.** See Insurance.

**Limitation of Actions.** See Statute of Limitations.

**Liquidated Damages.** See Damages.

**Liquor Laws.**

Sale of liquor to Indians may be punished under territorial act and act of Congress: *Territory v. Coleman*, 1 Or. 191.

Statute forbidding any person to barter, sell, or dispose of liquor in any manner does not forbid giving: *Wood v. Territory*, 1 Or. 223; *State v. Cutting*, 3 Or. 260.

The statute was intended to regulate the traffic in spirituous liquor for a consideration or motive of gain: *Id.*

A conviction for giving cannot stand under an indictment for selling liquor: *Id.*

Allegation of sale of whisky is supported by proof of sale of any kind of spirituous liquor: *Frisbie v. State*, 1 Or. 248.

Keeping open tippling-house on Sunday is indictable under statute, and need not be prosecuted before magistrate: *Palmer v. State*, 2 Or. 66.

Charter of city of Salem does not operate to repeal or change the state license law in that city: *Id.*

Portland charter restricting granting of county license in the city affects state law as to the granting of license only: *Burchard v. State*, 2 Or. 78.

The penal provisions of the state law still apply within the city limits: *Id.*

**Liquor Laws (continued).**

Requisites in indictment, and what is surplusage therein: Id.

Act of 1854, relating to sale of liquor on Sunday, not repealed by implication by section 653 of Code of 1865 (sec. 1890, Hill's A. L.): *State v. Benjamin*, 2 Or. 125.

Money paid to county treasurer, for a license which was refused by county court, cannot be recovered by action for money had and received: *Trainor v. Multnomah Co.*, 2 Or. 214.

Time and kind of spirituous liquor is immaterial, and need not be strictly proved as alleged in indictment; but person to whom sold must be proved as alleged: *State v. Cutting*, 3 Or. 260.

Burden of proof is on defendant to show he is licensed: Id.

If defendant sells liquor, it is immaterial whether it is paid for: Id.

Sale of candy and giving liquor, a subterfuge of no avail: Id.

Power of city of Portland to license, etc., bar-rooms and drinking-shops: *Matter of Schneider*, 11 Or. 288; *Portland v. Schmidt*, 13 Or. 17.

Bar-room and drinking-shop defined: Id.

"Quarter," in ordinance, held to mean quarter of year: Id.

City may require a bond from applicant for license: Id.

Provision in bond for observance of "all other ordinances of said city," restricted in its application and construction to ordinances in regard to licensing bar-rooms: Id.

Ordinance may prescribe qualifications of sureties on bond: Id.

Right of seizure by Indian agent of team and wagon hauling liquor on reservation: *Webb v. Nickerson*, 11 Or. 382.

Defenses in action by owner for the recovery of the property seized: Id.

Power to license, tax, regulate, and restrain includes power to prohibit the carrying on of the business without complying with the provisions of the ordinance: *Portland v. Schmidt*, 13 Or. 17.

Such power includes, without express provision in the charter, the power to provide the terms and conditions



**Liquor Laws (continued).**

upon which license should be issued, the amount and mode of collecting tax, and to establish reasonable rules to be observed in carrying on the business: *Id.*

Power to license includes power to fix the license fee, but not to impose a fee operating as a prohibition: *Id.*

Such power, and the power to provide for the good order of the city, includes the power to prohibit the sale on particular days, or at particular places, but not to prohibit generally: *Id.*

County is a necessary party defendant in proceeding to review action of County Court refusing license: *Wood v. Riddle*, 14 Or. 254.

Act providing license for cities and towns, as well as counties, held unconstitutional as being, without complying with the constitution as to amendments, amendatory of municipal charter, and as not embracing but one subject expressed in the title: *State v. Wright*, 14 Or. 365.

Bill to license sale of liquor is not a bill to raise revenue, and may originate in either house of the legislature: *Id.*

Statute conferring on town of Kalama power to license the sale of liquor does not repeal or limit the general statute prohibiting sale without license from county commissioners: *Corbett v. Territory*, 1 W. T. 431.

Action for damages for breach of contract of sale of liquor to be used for retailing in violation of the license law, cannot be maintained by unlicensed dealer: *Bach, Messe, & Co. v. Smith*, 2 W. T. 145.

Act of 1883, to incorporate Olympia, empowering it to license, regulate, and restrain drinking-saloons, repealed act of 1873, which placed limitations on its powers in that respect: *Hadlan v. Olympia*, 2 W. T. 340.

Whether the amount of the license fixed by ordinance is greater than authorized in the exercise of police power by the city, questioned by minority of the court: *Id.*

**Lis Pendens.**

To operate as notice binding innocent purchaser for valuable consideration, the cause should be prosecuted with reasonable dispatch; suspension for five years unreasonable: *Bybee v. Summers and Ellis*, 4 Or. 354.

In the absence of statute in Oregon, declaring the effect

**Lis Pendens** (continued).

of a decree upon a *lis pendens* purchaser, the common-law rule will prevail: Walker v. Goldsmith, 14 Or. 125. Doctrine is inapplicable to case, where a deed, conveying legal title, is made pending the suit, when grantee was already the equitable owner prior to the suit: Id. *Quære*, when notice begins; whether after summons served, or complaint filed, or before answer containing new matter upon which decree is ultimately rendered in favor of the defendant: Id.

**Locks.**

Lock bonds redemption act of 1874, unconstitutional as impairing obligation of contracts: Goldsmith v. Brown, 5 Or. 418.

*Mandamus* the proper remedy to compel owners of boats to furnish lists of freight and passengers passed through the locks under act of 1876 (sec. 3207, Hill's A. L.): Board of Com. v. W. Trans. Co., 6 Or. 219.

Regulation in regard thereto in section 12 of the act (sec. 3207, Hill's A. L.), is reasonable, and within legislative power: Id.

Corporation owning boats, and operating as a carrier under state franchise, is subject to such regulations, and is not exempted by reason of owning the canal and locks: Id.

**Logs.** See Timber and Logs.**Lost Papers.** See Bonds and Undertakings.

Loss or absence of material paper from judgment roll, no ground for reversal: Carland v. Heineborg, 2 Or. 75.

Transcript on appeal must contain substituted copies of all material papers that have been lost from the record, and the appellant must bring a perfect record to the appellate court: Wolf v. Smith, 6 Or. 73.

Official bond being lost, equity will administer complete relief to person injured by acts of the officer: Howe v. Taylor, 6 Or. 284; S. C., 9 Or. 288.

Where the making of an instrument is in dispute, and pretended copy is offered in evidence, its genuineness as a copy and the fact of execution is to be left to the jury: Rosendorf v. Hirschberg, 8 Or. 240.

Parol evidence of contents of original and of recorded copy admissible in action on lost bond where both original and copy are lost: Howe v. Taylor, 9 Or. 288.

**Lost Papers (continued).**

The presumption is, that a lost official undertaking was duly executed: *Id.*

Parol proof of the names signed as sureties is admissible: *Id.*

On appeal, original exhibit being lost before transcript is sent up, cannot be supplied in the Supreme Court by sworn copy, and appeal must be dismissed: *Corbitt and Macleay v. Bauer and Roemer*, 10 Or. 340.

In case of loss of original record by fire in Justice's Court, before transcript was certified upon appeal, but after notice of appeal, the District Court upon application of appellant will docket the cause, to enable him to show the facts and supply the loss: *Mullen v. Mullen*, 1 W. T. 192.

The Justice's Court was not the proper court to supply the lost records: *Id.*

**Lost Property.**

Finder cannot use property found, to remunerate himself for trouble and expense in finding and caring for same: *Watts v. Ward*, 1 Or. 86.

He is not entitled to reward, unless reward was offered by the loser: *Id.*

**Lotteries.**

Lottery defined; payment of prizes in money not essential: *Fleming v. Bills*, 3 Or. 286.

Essentials of the offense, and what a sufficient indictment for setting up: *State v. Dougherty*, 4 Or. 200.

**Lunacy.** See *Insanity*.

**Machinery.** See *Admiralty*; *Liens*; *Master and Servant*; *Negligence*.

**Mail-carriers.** See *Highways*.

**Maiming.** See *Mayhem*.

**Maintenance.** See *Champerty*.

**Malice.** See *Assault and Battery*; *Criminal Law*; *Damages*; *False Imprisonment*; *Homicide*; *Malicious Prosecution*; *Slander and Libel*.

**Malicious Prosecution.**

An intentional shooting a person, resulting in death, is *prima facie* probable cause for arrest of the slayer: *Glaze v. Whitley*, 5 Or. 164.

To sustain the action for malicious prosecution, it must

**Malicious Prosecution** (continued).

be shown that the prosecution was both malicious, and without probable cause: *Id.*

Probable cause is question of law and fact; province of the jury to find the facts, and of the court to find whether they amount to probable cause: *Id.*; *Gee v. Culver*, 12 Or. 228.

Plaintiff must allege the prosecution complained of was determined in his favor, or abandoned by the defendant: *Merriman v. Morgan*, 7 Or. 68; *Ferguson v. Tobey*, 1 W. T. 275.

Release from custody by *habeas corpus*, pending investigation of the offense by the grand jury, is not itself a termination of the prosecution: *Id.*

No defense that defendant laid the facts before a justice, and acted on his advice in making the arrest: *Gee v. Culver*, 12 Or. 228.

Malice is not a presumption or conclusion of law, but a fact to be proved: *Gee v. Culver*, 12 Or. 228; *S. C.*, 13 Or. 598.

Under a simple denial, defendant cannot prove justification: *Id.*

Affirmative matter, not amounting to a justification, may be joined to a denial, and need not be separately stated: *Id.*

Malice need not be anger, hatred, or revenge, but includes every unlawful and unjustifiable motive: *Gee v. Culver*, 13 Or. 598.

The act itself, and all circumstances, may be inquired into to ascertain the motive: *Id.*

Not the guilt of the prosecuted, but the intention of the prosecutor, that is the subject of inquiry: *Id.*

Bad reputation of plaintiff for honesty and integrity may be proved to rebut proof of want of probable cause, and in mitigation of damages: *Id.*

Plaintiff cannot be asked, on direct examination, to state the amount of the damages he sustained; must state the facts, and let the jury decide: *Ferguson v. Tobey*, 1 W. T. 275.

In mitigation for continued imprisonment, it may be shown that the plaintiff was offered and refused bail: *Id.*



**Malpractice.** See Damages; Negligence; Physicians and Surgeons.

**Mandamus.**

Lies to compel officer to perform a duty resulting from his office, enjoined upon him by law: *Ball v. Lappius*, 3 Or. 55.

Proper remedy only when party has legal right, and no legal remedy: *Id.*; *Habersham v. Sears*, 11 Or. 431.

The right must be certain, and distinctly proved: *Id.*

The granting or refusing the writ is discretionary: *Id.*

Ordinance requires city marshal to procure and select, subject to approval, a small-pox hospital; the duty cannot be enforced by *mandamus*: *Id.*

Office of writ same under Code as at common law: *Warner v. Myers*, 3 Or. 218; *Durham v. Monumental S. M. Co.*, 9 Or. 41; *Habersham v. Sears*, 11 Or. 431.

Cannot be used to determine ultimate right to office: *Id.*; *Warner v. Myers*, 4 Or. 72.

Answer denying the legality of the election of the petitioner to office which he holds will not abate writ: *Id.*

An answer declaring that a contest was pending to determine the legality of the election was struck out: *Id.*

An answer to petition of one having possession of office and certificate of election, which declares that a majority of the legal votes were cast for the defendant, was struck out on motion: *Id.*

Proper remedy when school clerk has funds, and refuses to pay warrant presented: *Howard v. Bamford*, 3 Or. 565.

So, to require incumbent to deliver to successor appurtenances of office: *Warner v. Myers*, 4 Or. 72.

The only question to be determined is, to whom certificate of election was awarded: *Id.*

*Mandamus* to County Court to complete its record, proper remedy in Circuit Court, and not injunction: *Road Co. v. Douglas Co.*, 5 Or. 373.

Proper remedy to test the qualifications of voters, the legality of the conduct of the judges, or the canvass of election selecting county seat, and not injunction: *McWhirter v. Brainard*, 5 Or. 426.

Proper remedy to compel owners of steamboats to furnish freight and passenger lists passed through the locks, as

**Mandamus** (continued).

required by act of 1876 (sec. 3207, Hill's A. L.): Board of Com. v. W. Trans. Co., 6 Or. 219.

Not proper remedy where there is a plain, speedy, and adequate remedy at law: Durham v. Monumental S. M. Co., 9 Or. 41.

Will not lie to compel the transfer of stock in a corporation: Id.

Lies to board of canvassers of election to perform ministerial functions in canvassing, though their canvass is completed: Simon v. Durham, 10 Or. 52.

Motion to dismiss appeal from refusal to grant the writ, on the ground that the question of the right to office is involved in another case pending, denied: Id.

Supreme Court may, on application for *mandamus* to compel enforcement of its decrees, inquire into the merit of an injunction of a Circuit Court restraining the same: State v. Jacobs, 11 Or. 314.

The issuing of the writ is conclusive as to the invalidity of the injunction: Id.

Sheriff violating such restraining order is entitled to discharge in proceedings for contempt in such Circuit Court, on producing the writ of *mandamus*: Id.

*Mandamus* does not lie to compel sheriff to levy, where there is no showing that an action on his bond for his neglect or refusal would be unavailing: Habersham v. Sears, 11 Or. 431.

Judge may be compelled to sign bill of exceptions by *mandamus*: Ah Lep v. Gong Choy, 13 Or. 205.

Duty of clerks of counties to make out notices of election, naming the offices to be filled, etc., before elections, is imperative, and may be enforced by *mandamus*: State v. Ware, 13 Or. 380.

When the question is one of public duty and in which the general public is interested, the relator need show no special interest other than as a citizen and voter: Id.

Proper remedy to compel sheriff to release from assessment property wrongly assessed, where he refuses, upon proper showing, to remit the tax illegally charged: Smith v. King, 14 Or. 10.

*Mandamus* is not the proper remedy to compel the treasurer of Umatilla County to pay over to Morrow County

**Mandamus** (continued).

school taxes collected, upon the creation of the latter county out of the former: *Morrow Co. v. Hendryx*, 14 Or. 397.

The act not being specially enjoined as a duty resulting from an office, trust, or station, *mandamus* does not lie: *Id.*

Power of judge at chambers relative to writs of mandate not determined, but appearance of defendant in court and subsequent proceedings cured every irregularity: *Clarke County v. Brazee*, 1 W. T. 199.

Statutes have rendered the difficult learning of old writs obsolete: *Id.*

The complaint in the case is sufficient to entitle to the relief sought: *Id.*

County having applied, through its prosecuting attorney, for writ against county commissioners, such attorney cannot, though it be the wish of both parties, represent both in subsequent proceedings: *Clarke Co. ex rel. etc. v. Commissioners of Clarke County*, 1 W. T. 250.

**Mandate.** See Appeal and Error.

**Manslaughter.** See Criminal Law; Homicide.

**Maritime Contracts.** See Admiralty; Boats and Vessels; Contracts.

**Maritime Law.** See Admiralty.

**Marriage.** See Divorce; Husband and Wife.

Is a valuable consideration; when deed set aside for fraud: *Bonser v. Miller*, 5 Or. 110.

Deposition taken in another proceeding between different parties, to prove marriage, not admissible under section 819 of the Code (sec. 829, Hill's A. L.): *Murray v. Murray*, 6 Or. 26.

Cohabitation, and recognition in society as husband and wife, is *prima facie* proof of marriage in a civil suit: *Id.*

Contract is not within the purview of constitutional inhibition of laws impairing obligation of contracts: *Rugh v. Ottenheimer*, 6 Or. 231; *Maynard v. Valentine*, 2 W. T. 3; *Maynard v. Hill*, 2 W. T. 321.

Concealment by the woman, from intended husband, of the fact that she had been the mother of a bastard, not such fraud as will annul the marriage: *Smith v. Smith*, 8 Or. 100.

**Marriage** (continued).

Complaint for breach of promise, what sufficient: *Lahey v. Knott*, 8 Or. 198.

Evidence and instructions; when plaintiff must prove request or offer to marry on her part before action: *Id.*

On marriage, at common law, personalty of the wife in her possession or subsequently reduced to her possession, or that of the husband during the coverture, became the property of the husband: *Cressey v. Tatom*, 9 Or. 541.

In crim. con., the marriage may be proved by the testimony of eye-witnesses or of the parties: *Jacobsen v. Siddal*, 12 Or. 280.

State has paramount and controlling interest in marriage, and legislature has plenary power over divorce and marriage: *Maynard v. Valentine*, 2 W. T. 3; *Maynard v. Hill*, 2 W. T. 321.

**Married Women.** See Husband and Wife.

**Marshal.** See Summons.

**Marshaling.** See Liens; Mortgages.

**Master in Chancery.** See Affidavits.

**Master and Servant.** See Damages; Municipal Corporations; Negligence.

Corporation liable for carelessly firing a gun by agent, though done in a manner different from orders: *Oliver v. N. P. T. Co.*, 3 Or. 84.

Agent alone is liable where he abandons principal's business and causes injury; but otherwise, when he does the business of the principal, although he does not act in the manner directed: *Id.*; *French v. Cresswell*, 13 Or. 418.

Person employed about dangerous machinery must use his thinking faculties: *Stone v. Oregon City Mfg. Co.*, 4 Or. 52.

Rule of liability of master for defective machinery furnished servant: *Id.*

In action for negligence in not supplying suitable appliances, it was held error to instruct on general propositions of law as to defendant's duty in employing fellow-servants: *Willis v. Or. R'y & Nav. Co.*, 11 Or. 257.

Rule of liability of master for injury occasioned by negligence of fellow-servants and vice-principals: *Id.*



**Master and Servant** (continued).

Foreman of a gang of laborers erecting a shed under directions of a superior is a fellow-servant with the laborers: *Id.*

Exemplary damages for wrongful act of servant, when recoverable: *Sullivan v. Or. R'y & Nav. Co.*, 12 Or. 392.

Master liable for damage by trespass by his sheep in charge of a servant, although the latter disobeyed orders in occasioning the damage: *French v. Cresswell*, 13 Or. 418.

The relation between master and servant does not express the more complex relation between master and crew: *Nickels v. Griffin*, 1 W. T. 374.

City liable for negligence of contractor, working under supervision of city surveyor, in improvement of street, whereby adjoining lot is injured: *City of Seattle v. Buzby*, 2 W. T. 25.

In such case the contractor is servant of the city, and the rule of *respondeat superior* applies: *Id.*

**Master of Vessel.** See Admiralty.

Power of master to bind owners of a vessel: *Gove v. Moses*, 1 W. T. 7.

Cannot act as agent of consignee until his duty as master ceases: *Id.*

Relation of master and crew; source, measure of, and reason for master's authority: *Nickels v. Griffin*, 1 W. T. 374.

It is the duty of master to maintain order on vessel, of sailor to obey, and there is a correlative right of sailors to the protection of master from assault by mate: *Id.*

Master is responsible for injuries inflicted on seaman by mate without sufficient cause, with master's knowledge: *Id.*

**Mayhem.**

Any offense made punishable by section 527 of Criminal Code (sec. 1735, Hill's A. L.), may be called mayhem in indictments: *State v. Vowels*, 4 Or. 324.

**Measure of Damages.** See Damages.**Mechanics' Liens.** See Liens.**Merger.**

If the owner in whom different estates have united has an interest in keeping them separate, the intent to keep

**Merger (continued).**

them separate is presumed, and there is no merger: *Watson v. Dundee M. & T. I. Co.*, 12 Or. 474.

There can be no merger where an outstanding estate intervenes: *Id.*

**Mesne Profits.**

Mortgagee in possession cannot claim his possession is unlawful, when he is sued for the mesne profits: *Renshaw v. Taylor*, 7 Or. 315.

Court may order a reference to ascertain the amount of such mesne profits: *Id.*

After ejectment, when the person ejected has established his right by a suit in equity, he may recover the mesne profits in the same suit, which he was adjudged to pay by the judgment: *Starr v. Stark*, 7 Or. 500; *Hill v. Cooper*, 8 Or. 254.

Such suit does not operate on the judgment at law, but on the parties, and the decree may enjoin the enforcing of the judgment: *Id.*

Rents and profits received to the use of another by one in possession with the legal title may be recovered in a suit in equity: *Hill v. Cooper*, 8 Or. 254.

In an action to recover rents and profits, proof of the use and occupation and the annual value of the premises is admissible: *Hill v. Cooper*, 10 Or. 153.

Evidence that co-tenant in possession, who has redeemed the property at tax sale and claims to hold until reimbursed, has been receiving the whole of the rents and profits, is admissible: *Minter v. Durham*, 13 Or. 470.

**Militia.**

It is the duty of the County Court to provide an armory for a militia company: *Mountain v. Multnomah Co.*, 8 Or. 470.

The County Court must audit, allow, and cause to be paid, necessary expenses of same, and its decisions thereon may be reviewed by a writ of review: *Id.*

But on review it must appear affirmatively by the record that every step to make the claim against the county a proper one has been duly taken: *Vincent v. Umatilla Co.*, 14 Or. 375.

**Mills.** See Dams; Water and Watercourses.

Breakwater and dam are part of mill, so that lien for work

**Mills (continued).**

on the dam attaches to the mill: Willamette Falls etc. Co. v. Remick, 1 Or. 169.

Agreement to convey land, mill, etc., held to include all things necessary to the enjoyment of the mill privilege, and to permit raising the dam where necessary to the full use and enjoyment of the property: Brugger v. Butler, 6 Or. 459.

Right of way granted for mill-race does not include a right to appropriate water of a stream, crossing the right of way, on grantor's land: Miller v. Vaughn, 8 Or. 333.

Such grant is a mere easement, and an express reservation of water flowing on grantor's land is unnecessary: *Id.*

Right to overflow adjoining land is an easement which will pass by grant of a mill and its appurtenances: Jackson v. Trullinger, 9 Or. 393.

**Mines and Mining.** See Public Lands.

Mines of precious metals belong to the eminent domain of the sovereignty: Gold Hill Q. M. Co. v. Ish, 5 Or. 104.

Occupancy and pre-emption under act of Congress of July 26, 1866: *Id.*

Patent to agricultural lands does not pass title to known deposits of precious metals: *Id.*

Failure of government surveyors to segregate mining from agricultural land does not affect rights of occupant miners: *Id.*

Water rights for mining, under United States statutes, cannot be lost by non-user alone, short of the period of limitations for real actions: Dodge v. Marden, 7 Or. 456.

Such rights may be abandoned, which is evidenced by an act showing an intention to surrender or forsake the right: *Id.*

Under the Oregon statute, if a water right is so abandoned, and the person having the right ceased for one year thereafter to exercise any act of ownership over it, his right becomes lost: *Id.*

Purchaser of land is not bound to disclose his knowledge of a mine to the vendor: Caples v. Steel, 7 Or. 491.

But his willful misrepresentation of the facts will render the sale voidable: *Id.*

**Minors.** See Guardian and Ward; Infants; Parent and Child.

**Misdemeanor.** See Criminal Law.

**Misjoinder.** See Parties. Pleadings.

**Misrepresentations.** See Fraud and Deceit.

**Mistake and Accident.**

Money paid under mistake of law in absence of fraud cannot be recovered: *Johnson v. McGinness*, 1 Or. 292.

Due diligence must be shown to enable court to enjoin a judgment for mistake or accident: *Wells, Fargo, & Co. v. Wall*, 1 Or. 295.

To set aside a judgment, actual and specific fraud, or surprise, accident, or mistake, must be specific in bill: *Snyder v. Vannoy and Hyland*, 1 Or. 344.

Mistake, accident, or fraud must appear, or equity will not relieve from ignorance of a fact: *Fahie v. Pressey*, 2 Or. 23.

Mistake as ground for a relief from a writing must clearly show the mistake contrary to the intention: *Shively v. Welch*, 2 Or. 288.

Mistake of clerk in not entering judgment by confession in the judgment-book does not affect validity of judgment, except in favor of one who has been misled by the omission: *King v. Higgins*, 3 Or. 406.

Evidence must be clear and satisfactory to warrant correction of deed for a mistake: *Lewis v. Lewis*, 4 Or. 177; *Stephens v. Murton*, 6 Or. 193; *Ramsey v. Loomis*, 6 Or. 367; *Remillard v. Prescott*, 8 Or. 37.

Must have been the mutual mistake of the parties: *Evarts v. Steger*, 5 Or. 147.

What complaint must show in suit to reform deed on the ground of mistake: *Lewis v. Lewis*, 5 Or. 169; *Stephens v. Murton*, 6 Or. 193; *Ramsey v. Loomis*, 6 Or. 367.

Reformation will not be granted for fraud, where complaint alleges mistake only: *Stephens v. Murton*, 6 Or. 193.

But where the language of the complaint is ambiguous as to whether fraud or mistake is alleged, the objection, if not taken in time, is waived: *Baldock v. Johnson*, 14 Or. 542.

Land not included in the deed, omitted by mistake, may be inserted: *Ramsey v. Loomis*, 6 Or. 367.



**Mistake and Accident** (continued).

It must be shown that the grantor was a party to the mistake in the deed: *Remillard v. Prescott*, 8 Or. 37.

Equity will not interpose to correct a deed made *pendente lite* between parties to a divorce suit, which is made in consideration of not defending the suit: *Phillips v. Thorp*, 10 Or. 494.

Supreme Court has power, under section 100 of the Code (sec. 102, Hill's A. L.), to relieve from a mistake in a decree occurring in Circuit Court, where the opportunity to apply to the Circuit Court was lost by reason of an appeal having been taken: *Wright and Jones v. Edwards*, 10 Or. 288.

To warrant correction of decree, mistake must be clearly proved, and not a judicial mistake, and there must be no other remedy: *Smith v. Butler*, 11 Or. 46.

Mistake in decree in description of a division line established by referees corrected: *Id.*

Party doing work on another's contract, by mistake, cannot recover the value of such work: *Rohr v. Baker*, 13 Or. 350.

Mistake must be remedied in equity, and cannot be shown by parol proof varying the terms of a deed, as a defense in ejectment: *Holcomb v. Mooney*, 13 Or. 503.

Amicable adjustment of disputed claims will not be set aside for mistake of law or fact, in the absence of fraud or want of equity: *Wells v. Neff*, 14 Or. 66.

Total want of understanding of the nature or value of estate conveyed by daughter to mother without consideration warrants relief on the ground of mistake: *Baldock v. Johnson*, 14 Or. 542.

Mistake as a defense to action on account stated: *Baxter v. Waite*, 2 W. T. 228.

**Money.**

State has power to require taxes to be paid in coin, and such is the law in Oregon: *Whittaker v. Haley*, 2 Or. 128.

Fees of officers may be paid in any legal money, and officer has no right to demand coin: *Coffin v. Coulson*, 2 Or. 205.

On complaint for \$80, plaintiff cannot recover \$114, on ground that coin was worth that in currency: *Davis v. Mason*, 3 Or. 154.

**Money (continued).**

Evidence of value of coin or custom of banks to pay coin on checks not admissible: *Id.*

Contract to pay in gold coin must be in writing: *Id.*

Complaint on contract to pay in gold coin need not allege the contract was in writing: *Taylor v. Patterson Co.*, 5 Or. 121; *Russell v. Swift*, 5 Or. 233.

Statute construed; does not alter rules of pleading, but mode of proof: *Id.*

Constitution, section 1, article 9, does not prohibit establishing banks, except those issuing notes and bills to circulate as money: *State v. H. S. & L. A.*, 8 Or. 396.

Any mark commonly understood and employed in business transactions to denote the division into dollars and cents, sufficient in general records to indicate that the figures represent money: *De Lashmutt v. Sellwood*, 10 Or. 319.

**Money Had and Received.** See *Assumpsit*.

Does not lie for money paid under mistake of law without fraud: *Johnson v. McGinness*, 1 Or. 292.

Nor for money deposited under statute with county treasurer, on application for liquor license which was denied: *Trainor v. Multnomah Co.*, 2 Or. 214.

County may recover money paid to officer under claim of right for his services against law: *Grant Co. v. Sels*, 5 Or. 243.

The nature and scope of the action of money had and received: 9 Or. 481.

Lies to recover money paid by purchaser at sale on execution, issued without a judgment: *Id.*

Lies for money paid by debtor to creditor to be applied on a certain debt, and which is not so applied: *Stewart v. Phy*, 11 Or. 335.

In such action, it is unnecessary to allege a promise to repay: *Id.*

Lies to recover money obtained by defendant, which *ex aequo et bono* belongs to plaintiffs: *Peterson v. Foss*, 12 Or. 81.

**Month.**

When the word "month" occurs in a statute, lunar month is intended, unless the statute indicates otherwise: *Hale v. Finch*, 1 W. T. 517.

**Monuments.** See Boundaries.

**Mortgages.** See Chattel Mortgages.

1. THE MORTGAGE; ITS CONSTRUCTION AND VALIDITY.

2. FORECLOSURE AND REDEMPTION.

3. PRIORITY AND RIGHTS OF PARTIES.

1. THE MORTGAGE; ITS CONSTRUCTION AND VALIDITY.

A mortgage attested by one witness will be upheld in chancery between the parties: *Moore v. Thomas*, 1 Or. 201.

So, a mortgage unrecorded and unacknowledged: *Id.*

Effect of signing by one partner, with assent of other, the firm name to note and mortgage: *Chavener v. Wood*, 2 Or. 182.

Mortgage does not vest title or interest in mortgagee in the property, but is a mere security: *Anderson v. Baxter*, 4 Or. 105; *Sellwood v. Gray and De Lashmutt*, 11 Or. 534.

Is incident to the debt; and a transfer of the note or other evidence of indebtedness carries the mortgage: *Roberts v. Sutherlin*, 4 Or. 219.

The County Court may order guardian to mortgage minor's real property: *Trutch v. Bunnell*, 5 Or. 504; *contra*, *Trutch v. Bunnell*, 11 Or. 58.

Forfeiture of the debt to school fund for usury carries mortgage security also: *Chapman v. State*, 5 Or. 432.

Pre-existing debt or liability is sufficient consideration: *Moore v. Fuller*, 6 Or. 272.

Mortgage by a woman of her separate property for husband's debt may be enforced: *Id.*

Deed, absolute on its face, may be shown by parol to have been intended as a mortgage: *Hurford v. Harned*, 6 Or. 362; *Stephens v. Allen*, 11 Or. 188; *Albany and Santiam W. D. Co. v. Crawford*, 11 Or. 243; *Wilhelm v. Woodcock*, 11 Or. 518; *Miller v. Ansenig*, 2 W. T. 22.

Mortgage to secure future advances is valid: *Hendrix v. Gore*, 8 Or. 407; *Nicklin v. Betts Spring Co.*, 11 Or. 406.

Act of 1882, providing for the taxation of mortgages, is constitutional: *Mumford v. Sewall*, 11 Or. 67; *Crawford v. Linn County*, 11 Or. 482.

Principles and evidence upon which a deed is construed as a mortgage: *Stephens v. Allen*, 11 Or. 188; *Albany*

**Mortgages (continued).**

and Santiam W. D. Co. v. Crawford, 11 Or. 243; Wilhelm v. Woodcock, 11 Or. 518.

Evidence to prove a deed, absolute on its face, a mortgage, should be clear and satisfactory: Albany and Santiam W. D. Co. v. Crawford, 11 Or. 243; Wilhelm v. Woodcock, 11 Or. 518.

Contract construed and held a mortgage, and amount due determined from the evidence: Manaudas v. Heilner, 12 Or. 335.

Mortgage, though but a security, is a conveyance within the registry acts: Fleschner v. Sumpter, 12 Or. 161; Watson v. Dundee M. & T. I. Co., 12 Or. 474.

Merely taking deed absolute, intended as a mortgage, where there is no concealment, is not fraud on the mortgagor's creditors: Haseltine v. Espey, 13 Or. 301.

Statute of Washington Territory, relating to mortgages, is taken from Indiana, and differs from statutes in California and New York: Hays v. Miller, 1 W. T. 143.

Agreement for sale of land and execution of a deed upon the vendee paying certain taxes and certain other sums in installments, and on failure to pay any installment the whole to become due, construed as an equitable mortgage: Wood v. Mastick, 2 W. T. 64.

Whether a parol contract can be set up to show that note, secured by mortgage absolute on its face, was conditional, to be void on failure of payee to execute a deed, *quære*: Kenworthy v. Merritt, 2 W. T. 155.

**2. FORECLOSURE AND REDEMPTION.**

Wife holding legal title is necessary party; and in suit to foreclose husband's mortgage on her property is not estopped by silence or notice, to claim her rights, not having been made a party: Fahie v. Pressey, 2 Or. 23.

Decree in foreclosure under the Oregon statute; its nature as regards subsequent lienors made parties: Chavener v. Wood, 2 Or. 182.

Plaintiff in execution becoming purchaser extinguishes his specific lien: *Id.*

Who may redeem, and upon what terms: *Id.*; Abraham v. Chenoweth, 9 Or. 348; Sellwood v. Gray and De Lashmutt, 11 Or. 535; Parker v. Dacres, 2 W. T. 439.

Does not bind encumbrancer not made a party; junior



**Mortgages (continued).**

and subsequent lienors proper parties: *Besser v. Hawthorne*, 3 Or. 129; *S. C.*, 3 Or. 512; *Sellwood v. Gray and De Lashmutt*, 11 Or. 534.

Equity of redemption defined; cannot be cut off except by decree or conveyance by mortgagor: *Id.*

Statute defining, does not create equity of redemption; simply defines mode of exercise: *Id.*

Equity of redemption cannot be divested by suit to which one having a lien is a stranger: *Id.*

Mortgagee, not made party, need not redeem, but may foreclose as if no sale made: *Id.*

Former rule, that party not served was, in the absence of fraud, bound by the account, does not cut off the right to redeem: *Id.*

On foreclosure of junior mortgage, proceeds, how applied: *Id.*

A junior mortgagee taking a lease of the premises from a mortgagee, not necessarily estopped to set up his right to redeem: *Atkinson v. Morrissy*, 3 Or. 332.

Mortgagor redeeming must tender debt, except where suit necessary to fix amount: *Id.*

Equity will assume jurisdiction where the question of right to redeem is in controversy: *Id.*

Mortgagee having made improvements, the mortgagor having agreed to pay therefor, such improvements were added to the sum due: *Id.*

Defendant refusing to accept money, on ground that plaintiff had no right to redeem, tender is unnecessary: *Id.*

Foreclosure suit is not a suit to determine interests in real property, within section 378 of the Code (sec. 382, Hill's A. L.), and is not affected by statute of limitations regarding such suits: *Anderson v. Baxter*, 4 Or. 105.

It is a mere collection of a debt, and does not involve trial of title: *Id.*

Absence of mortgagor from the state does not prevent statute from running on right to foreclose: *Id.*

Mortgagee in possession occupies no more favorable position than if out: *Id.*

Sale on execution, without foreclosing mortgage given to secure the debt, is not void, and is not subject to collateral attack: *Mathews v. Eddy*, 4 Or. 225.

**Mortgages (continued).**

- Mortgage may be foreclosed, although the notes are barred by statute of limitations: *Myer v. Beal*, 5 Or. 130.
- No defense in foreclosing mortgage on minor's property that guardian's name is signed to the note and mortgage, and not minor's: *Trutch v. Bunnell*, 5 Or. 504.
- Foreclosure of mortgage in suit by school land commissioners, the district attorney is entitled to prosecute, though other counsel may be employed to assist: *Claim of Ison*, 6 Or. 465.
- Heirs are necessary parties defendant in foreclosure-suit against executors: *Renshaw v. Taylor*, 7 Or. 315.
- Liability, on foreclosure, when new agreement has been substituted, leaving the old mortgage as security, is determined by the new agreement: *Id.*
- Decree of foreclosure against an estate void if heirs are not made parties: *Id.*
- Defendant denying the amount alleged to be due and alleging payment need not plead the payment as a counterclaim: *Hendrix v. Gore*, 8 Or. 406.
- On foreclosure of wife's mortgage after her death, one who has purchased the interest of her children, redeeming, holds as against a claim of husband to curtesy: *Abraham v. Chenoweth*, 9 Or. 348.
- Demurrer will not lie to complaint for describing land by reference to natural objects, apparently including a definite tract: *Ladd and Tilton v. Mason*, 10 Or. 308.
- Mortgagor is entitled to answer the affirmative matter alleged in the answers of co-defendants who claim liens in their favor: *Id.*
- No order of interpleader in such case is necessary, and answer filed may not be disregarded: *Id.*
- On foreclosure by mortgagee of mortgage securing several notes due him, surety on one of the notes cannot compel *pro rata* application of proceeds to all the notes: *Wilson v. Allen and Lewis*, 11 Or. 154.
- The amount that subsequent creditor not made a party to the foreclosure must pay to redeem is the amount due prior encumbrancer at time of sale, not merely the sum bid at the sale: *Sellwood v. Gray and De Lashmutt*, 11 Or. 534.
- But otherwise, where some one who was equitably bound has paid the balance over the bid: *Id.*

**Mortgages (continued).**

In a foreclosure against joint makers, the court cannot determine a controversy as to which was surety or principal: *Hovenden v. Knott*, 12 Or. 267.

An assignee of a mortgage taken in the name of the assignor who was a trustee for the assignee is bound by a default of the assignor in a suit to foreclose a prior lien: *Watson v. Dundee M. & T. I. Co.*, 12 Or. 474.

Statute preventing concurrent action for debt and foreclosure is in derogation of common law, and to be strictly construed: *Hays v. Miller*, 1 W. T. 143.

The object was to avoid multiplicity of suits, and accomplish both in one suit: *Id.*

When judgment is unsatisfied by sale of the mortgaged property, sheriff must proceed at once under copy of order of sale to levy on and sell such further property of debtor subject to execution as will satisfy the judgment: *Id.*

When the whole amount of the debt is due, judgment may be rendered therefor besides decreeing foreclosure, to have the same effect as a lien as other judgments, differing only in the manner of being satisfied: *Id.*

Simple decree of foreclosure is no lien on property outside the mortgage: *Id.*

Such decree cannot be amended *nunc pro tunc*, to give personal judgment for the debt, to the prejudice of other lien-holders on the property of the debtor: *Id.*

A decree of foreclosure obtained by fraud and collusion, for the purpose of cutting off the rights of a third person, being a sham, concludes no one, and no rights are determined thereby: *Connolly v. Cunningham*, 2 W. T. 242.

Right to redeem applies only to property sold on execution; not to that sold on foreclosure: *Parker v. Dacres*, 2 W. T. 439.

No equity of redemption in the mortgagor, since the legal title does not pass from him under the mortgage: *Id.*

Sale on foreclosure is absolute, unless court makes provision in decree for redemption by mortgagor: *Id.*

Suit to redeem property sold on foreclosure is not governed by statute of limitations concerning suits relating to real property, but is barred in two years under section 33 of the Code: *Id.*

**Mortgages (continued).****3. PRIORITY AND RIGHTS OF PARTIES.**

Subsequent recorded mortgage has priority over former one unrecorded: *Moore v. Thomas*, 1 Or. 201.

Subsequent lienors do not have priority over unrecorded mortgage when they are charged with the same notice the owner of the fee has, and he is estopped by recitals in his deed from denying: *Holmes v. Ferguson*, 1 Or. 220.

Subsequent recorded mortgage entitled to priority over equitable mortgage, in absence of notice in fact: *Chavener v. Wood*, 2 Or. 182.

Mortgagor retains right of possession, and the legal title: *Besser v. Hawthorne*, 3 Or. 129; S. C., 3 Or. 512.

Lien of senior mortgagee, merged in the legal title when he buys on foreclosure: *Id.*; *De Lashmutt v. Sellwood*, 10 Or. 319.

But when the intention is clear, the legal and equitable titles may be held separate: *Id.*

Proceeds applied, first, to prior mortgage; second, junior; third, holder of the legal title: *Id.*

Taking of mortgage is a waiver of vendor's lien: *Pease v. Kelly*, 3 Or. 417.

Mortgagee in possession with the consent of the mortgagor, after default of the latter, may remain until debt is paid, and is not liable to ejectment: *Roberts v. Sutherland*, 4 Or. 219.

Mortgage is incident to the debt, and a transfer of the note, if one exists, is necessary to carry the mortgage: *Id.*

Mortgagee in possession is entitled to allowance for necessary repairs, in his account of profits: *Adkins v. Lewis*, 5 Or. 292.

When grantee of mortgage absolute on its face conveys to *bona fide* purchaser, he cannot deny mortgagor's title in suit by mortgagor to recover value of the property: *Id.*

Accounting between such mortgagor and mortgagee: *Id.*

Minors are not adversary parties in proceeding before County Court by guardian for leave to mortgage real property of minors: *Trutch v. Bunnell*, 5 Or. 504. But see 11 Or. 58.

Married woman, having mortgaged her separate property



**Mortgages (continued).**

for husband's debt, must show the mortgagee was party to the fraud, to avoid the mortgage: *Moore v. Fuller*, 6 Or. 272.

Purchaser is not personally liable to pay the debt, unless he assumes the mortgage: *Walker v. Goldsmith*, 7 Or. 161.

But when he assumes the mortgage as part consideration, he is personally liable in the first instance: *Id.*

Forbearance or neglect by creditor to sell property pledged releases surety when the contract requires diligence in the sale of the property pledged: *Id.*

The taking of a mortgage for the debt waives mechanic's lien on same property: *Trullinger v. Kofoed*, 7 Or. 228.

Liability when new agreement has been substituted, leaving the old mortgage as security, is determined by the new agreement: *Renshaw v. Taylor*, 7 Or. 315.

Mortgagee in possession, when sued for mesne profits, cannot claim his possession was unlawful: *Id.*

Liability of broker lending money on second mortgage, insufficient as security, is discharged by principal signing composition agreement, releasing borrower: *Nicolai v. Lyon*, 8 Or. 56.

Damages recoverable from county clerk, for failure to record a mortgage: *Howe v. Taylor*, 9 Or. 288.

Mortgagee of the interest of one co-tenant, on partition acquires lien on the mortgagor's allotted portion: *Board S. L. Com. v. Wiley and Davis*, 10 Or. 86.

Mortgagee in possession by virtue of foreclosure and sheriff's deed is not in the position of one in possession with consent of mortgagor, until debt is paid: *De Lashmutt v. Sellwood*, 10 Or. 319.

Such mortgagee has no right of possession as against purchaser under a junior judgment lien, where the judgment creditor was not made a party to the foreclosure: *Id.*

Where the junior lien-holder is not made a party to the foreclosure of a prior mortgage, the purchaser under the foreclosure sale acquires the same position as an assignee of the mortgage, and is in effect a mere successor to the interest of the mortgagee foreclosing: *Id.*

**Mortgages (continued).**

- On foreclosure, mortgagee purchasing acquires legal title, and mortgage is merged: *Id.*
- Subsequent foreclosing of junior lien does not give mere right to redeem, but to sell the legal title: *Id.*
- Purchaser is not affected by subsequent proceedings in bankruptcy against mortgagor: *Id.*
- Mortgagee in possession under deed absolute on its face must tender conveyance before suing for the debt: *Wolcott v. Madden*, 10 Or. 370.
- Mortgage properly acknowledged has priority over a deed of same date, recorded at same time, but not entitled to record: *Fleschner v. Sumpter*, 12 Or. 161.
- Mortgage stands on same footing with deed with respect to recording: *Watson v. Dundee M. & T. I. Co.*, 12 Or. 474.
- Assignment of mortgage, though not recorded, protects assignee against subsequent lienors: *Id.*
- Assignments of mortgages need not be recorded, and need not be by formal conveyance: *Id.*
- Purchaser at foreclosure acquires the interest of the mortgagee, and so much of the equity of redemption as is not bound by junior liens: *Id.*
- There is no merger of the estates in the purchaser on foreclosure, where he has an interest in keeping them distinct, or there is an intervening interest outstanding: *Id.*
- Recording a deed, intended as a mortgage, in the record of deeds, is sufficient notice of grantee's claim: *Haseltine v. Espey*, 13 Or. 301.
- Seem*, that such instrument could not properly be recorded as a mortgage: *Id.*
- Evidence reviewed, and held not to warrant allowing mortgagee in possession compensation for managing: *Holladay v. Holladay*, 13 Or. 523.
- Where one has given a bond for a deed, and subsequently he mortgages the land to another, the mortgage transfers a security for the payment of the purchase price under the bond, to the extent of the mortgage: *Burkhart v. Howard*, 14 Or. 39.
- The assignee of the vendee's note after maturity, in such case, acquires no greater right than his assignor as against such mortgagee, although the mortgage was not recorded until after the assignment: *Id.*

**Mortgages** (continued).

If a written instrument constitute both a note and a mortgage, the holder at his option may recover on the note, or proceed to foreclose: *Frank v. Pickle*, 2 W. T. 55.

Under a contract to sell land and execute deed, which is construed as an equitable mortgage, vendee may, on failure of vendee to pay as agreed, foreclose against all his rights in the property: *Wood v. Mastick*, 2 W. T. 64.

Vendor in such case has option of foreclosing or tendering deed, and suing for purchase price: *Id.*

Under a sham decree of foreclosure, fraudulently and collusively obtained for the purpose of cutting off the rights of a third party, no rights are gained: *Connolly v. Cunningham*, 2 W. T. 242.

**Motions.** See Pleading; Practice.

**Multifariousness.** See Equity.

**Municipal Corporations.** See Constitutional Law; Elections; Highways; Master and Servant; Negligence; Statutes.

1. POWERS, AND THEIR EXERCISE.

2. LIABILITIES.

3. OFFICERS AND AGENTS.

4. STREETS, AND STREET ASSESSMENTS.

5. ACTIONS AND SUITS.

1. POWERS, AND THEIR EXERCISE.

Under power to license brokers, etc., no authority to license the "sale of bills of exchange," where the business is carried on by persons for themselves, and with their own funds: *Portland v. O'Neill*, 1 Or. 218.

After assessment is made, and the tax is levied thereon, the city cannot order additional assessment of property subsequently coming within the city: *Or. Steam Nav. Co. v. Portland*, 2 Or. 81.

Persons not previously assessed, who subsequent to the levy commence to deal in goods, may be assessed: *Id.* Charter of Corvallis not having given it power to try contest of municipal election, it has not that power: *Robertson v. Groves and Corvallis*, 4 Or. 210.

Statutes creating municipal corporations are to be strictly construed: *Id.*; *Corvallis v. Carlile*, 10 Or. 139; *Burmeister v. Howard*, 1 W. T. 207.

The power to try contest is not implied from the right to provide for election of officers: *Id.*

**Municipal Corporations** (continued).

Effect of limitation in Salem charter of municipal indebtedness to one thousand dollars: *Salem Water Co. v. Salem*, 5 Or. 29.

Ordinance to pay seventeen hundred dollars per annum for seventeen years, without providing means of payment, void: *Id.*

A devise that would be valid to a town is valid if made to trustees in perpetuity for the town: *Brown v. Brown*, 7 Or. 285.

A city is capable of becoming beneficiary of a trust in perpetuity: *Id.*

City need not resort to equity to annul a contract rendered void by the employment of Chinese on public works, contrary to the express stipulations of the contract: *Portland v. Baker*, 8 Or. 356.

Jurisdiction of a municipal body under its charter to judge of the election of its members is not exclusive, and Circuit Court will entertain proceedings under section 354 of the Code: *State v. McKinnon*, 8 Or. 493.

Charter provision giving trustees "power and authority" to repair streets, construed duty and obligation: *Ran-kin v. Buckman*, 9 Or. 253.

A city can exercise no powers not expressly conferred or necessarily implied: *Corvallis v. Carlile*, 10 Or. 139; *Portland v. Schmidt*, 13 Or. 17; *Hawthorne v. Portland*, 13 Or. 271.

Power to legislate to "secure the peace of the city" does not warrant the passage of an ordinance providing for closing stores on Sunday: *Id.*

Power of city of Portland to license bar-rooms and drinking-shops: *Matter of Schneider*, 11 Or. 288; *Portland v. Schmidt*, 13 Or. 17.

Validity of ordinance licensing bar-rooms, under charter power to license, tax, regulate, and restrain: *Portland v. Schmidt*, 13 Or. 17.

Power of city of East Portland to raise assessments, on assessment roll of property within the city, obtained from county assessment roll: *Dalton v. Portland*, 11 Or. 426.

Clause in a void ordinance repealing prior ordinances in conflict does not operate to repeal any ordinance con-



**Municipal Corporations** (continued).

clinging with the void provisions: *Portland v. Schmidt*, 13 Or. 17.

When an express power is granted, the power necessary to carry it into execution is implied: *Id.*

Power to license, regulate, tax, and restrain drinking-shops implies necessary power to effectuate the object, but not to prohibit absolutely: *Id.*

But may include power to prohibit, if license fee is not paid: *Id.*

Title of ordinance may be resorted to, to ascertain intention of council: *Id.*

City of Portland cannot declare violation of a city ordinance a misdemeanor: *Id.*

Power to improve streets, and tax the cost thereof, and sell real property for delinquent taxes, is statutory, and must be strictly pursued: *Dowell v. Portland*, 13 Or. 248; *Hawthorne v. Portland*, 13 Or. 271.

The exercise of such power is not an adjudication or the exercise of jurisdiction in a judicial sense: *Id.*

City of Astoria has power to suppress and prohibit bawdy-houses, and to punish violation of the ordinance: *Wong v. Astoria*, 13 Or. 538.

City has power to punish, under the provisions of charter, for an offense, though the same be punishable under state law, and criminal in its nature: *State v. Sly*, 4 Or. 277; *State v. Bergman*, 6 Or. 341; *Wong v. Astoria*, 13 Or. 538.

Power under charter to prevent and restrain riots, noise, disturbance, etc., on the streets, does not authorize city to punish for assault with dangerous weapon: *Walsh v. Union*, 13 Or. 589.

Power to improve, lay out, or establish streets must be strictly followed: *N. P. L. & M. Co. v. East Portland*, 14 Or. 3; *N. P. T. Co. v. Portland*, 14 Or. 24.

Legislature may provide for city water supply by direct act, without submitting the matter to vote of the people of the city: *David v. Portland Water Co.*, 14 Or. 98.

Supply of pure water to the metropolis of the state is a matter of public moment, as distinguished from private municipal affairs, and so is within the province of the legislature: *Id.*

**Municipal Corporations** (continued).

Amendment to charter, conferring additional powers, but not changing existing provisions, is not within article 4, section 22, of the constitution, and need not set forth the full act: *Id.*; *Sheridan v. Salem*, 14 Or. 328.

Act of 1885, providing for licensing liquor dealers, has the effect of amending charter of Astoria, the power to license having been already granted to that city by charter, and is void as not complying with the constitutional provisions regarding amendments: *State v. Wright*, 14 Or. 365.

Powers are to be strictly construed, but within their authority their ordinances have the effect of statutes: *Burmeister v. Howard*, 1 W. T. 207.

Seattle was incorporated under special act, which, whether within the legislative power or not, was subsequently ratified by act of Congress: *Seattle v. Yesler*, 1 W. T. 571.

The legislative grant of power to said city is within section 1924, Revised Statutes of the United States: *Id.*

Town may make assessments for local improvements a lien on property benefited, but cannot make the tax a personal charge: *Id.*

Act to incorporate Olympia, 1883, empowering the city to license, regulate, and restrain drinking-saloons, repealed the act of 1873, limiting its powers in those respects: *Hadlan v. Olympia*, 2 W. T. 340.

Whether the amount of the license, three hundred dollars, fixed by the city, exceeded its police powers is questioned: *Id.*

**2. LIABILITIES.**

City of Portland is not liable under its charter for injury to a person by defective street: *O'Harra v. Portland*, 3 Or. 525.

Notice, actual or implied, must be alleged and proved to hold a city liable for such injury: *Mack v. Salem*, 6 Or. 275.

Liability on contract for street improvement is not confined to funds realized from assessment on abutting property, unless so provided in the contract: *Frush v. Portland*, 6 Or. 281.

Charter provision exempting city from liability, but not

**Municipal Corporations** (continued).

exonerating officers from liability for willful neglect, held to render trustees liable for injury by non-repair of bridge: *Rankin v. Buckman*, 9 Or. 253.

In such case, lack of funds is matter of defense, and need not be anticipated by the complaint: *Id.*

City liable for damages for injuries received on defective walk, though the claim was not first presented to the council, which has by its charter to pass upon claims against the city: *Sheridan v. Salem*, 14 Or. 328.

Unless exempted from liability by its charter, city is liable under section 347 of the Code (sec. 350, Hill's A. L.) for injuries received in consequence of neglect of officers to keep streets in repair: *Id.*

This rule criticised, but adhered to on the principle of *stare decisis*: *Id.*

City is liable to abutting lot-owner for injury to his lot by negligence in improvement of street by contractor working under supervision of the city surveyor: *Seattle v. Buzby*, 2 W. T. 25.

In such case, contractor is servant of the city, and the rule of *respondeat superior* applies: *Id.*

City is liable for injury resulting from neglect to repair sidewalks, following the decisions of the United States Supreme Court: *Hutchinson v. Olympia*, 2 W. T. 314.

**3. OFFICERS AND AGENTS.**

Rules of order adopted by common council are binding on that body: *State v. Hoyt*, 2 Or. 246.

Offices of councilman and marshal are incompatible, and cannot be held by same person: *Id.*

City recorder *ex officio* justice of the peace within the city limits: *Ryan v. Harris*, 2 Or. 175; *Craig v. Mosier*, 2 Or. 323; *Sellers v. Corvallis*, 5 Or. 273.

Jurisdiction, powers, and salary of police judge: *State v. Wiley*, 4 Or. 184; *Portland v. Denny*, 5 Or. 160; *Adams v. Multnomah Co.*, 6 Or. 116.

Legislature may fix compensation of officers of city by charter or amendment thereto, and the method and source of payment: *Adams v. Multnomah Co.*, 6 Or. 116.

Public officers given power and authority to do an act are bound to perform it: *Rankin v. Buckman*, 9 Or. 253.

**Municipal Corporations** (continued).

Chief of police, acting as constable, cannot retain the fees earned: *Portland v. Besser*, 10 Or. 242.

Auditor and clerk has no power to make evidence by his certificate, excepting to authenticate by his certificate copies of records of which the law makes him custodian: *N. P. T. Co. v. Portland*, 14 Or. 24.

"Water committee," provided by act amendatory of Portland charter, are not officers elected or appointed under the constitution, and need not take oath of office: *David v. Portland Water Co.*, 14 Or. 98.

Such persons are not "officers" within the meaning of article 15, section 2, and sections 6 and 7, article 8, of the constitution, regarding terms of office: *Id.*

4. **STREETS, AND STREET ASSESSMENTS.**

Assessment on adjacent lots for their share for street improvement is in the nature of a tax: *King v. Portland*, 2 Or. 146.

Legislature and the council have power to so assess adjacent lots, and courts will not review the exercise of the discretionary power of the legislature to provide the mode of assessment for such expenses: *Id.*

Order of city council directing a street, once duly dedicated, to be fenced up is void: *Portland v. Whittle*, 3 Or. 126.

City of Portland is exempted from liability for injury to a person by defects in street by its charter: *O'Harra v. Portland*, 3 Or. 525.

Appeal from city council to Circuit Court in laying out street must be from the whole judgment, and the proceeding is tried *de novo*: *Portland v. Kamm*, 5 Or. 362.

Paramount control of streets and highways is in the legislature: *East Portland v. Multnomah County*, 6 Or. 62; *P. & W. V. R. R. Co. v. Portland*, 14 Or. 188.

State may transfer its control thereof within a city to the municipality: *Id.*

Notice of the defect, express or implied, must be alleged and proved to hold city liable for injury: *Mack v. City of Salem*, 6 Or. 275.

Liability on contract for street improvement is not confined to funds realized from assessment on abutting property, unless so provided in the charter: *Frush v. East Portland*, 6 Or. 281.



**Municipal Corporations** (continued).

Provision in charter, that proceedings shall be presumed regular, does not dispense with the necessity for the record showing that notice has been given: *Van Sant v. Portland*, 6 Or. 395.

Notice is jurisdictional, and in its absence from the record, the presumption cannot aid: *Id.*

Person owning a building, damaged by widening streets, can recover for improvements put thereon after the viewers report, and before the adoption of the report by the council: *Portland v. Lee Sam*, 7 Or. 397.

Not necessary under the provisions of the Portland charter to declare sewer necessary, or create taxing district, before proceeding to contract for building a sewer: *Stowbridge v. Portland*, 8 Or. 67.

Provisions in charter of Portland relating to streets do not apply to sewers: *Id.*

City may grade street at the approach to the river to facilitate travel or landing from boats, but cannot confer right to private person to do so to the injury of adjacent lots: *Price v. Knott*, 8 Or. 438.

Adjacent lot-owner may enjoin person threatening to grade down a street to the permanent injury of adjacent lots: *Id.*

Trustees held personally liable for neglect to repair streets, where under the charter they have power to repair: *Rankin v. Buckman*, 9 Or. 253.

Power to repair imposes a duty to keep streets in repair: *Id.*; *Hutchinson v. Olympia*, 2 W. T. 314.

Road included in the limits of a city by the legislature does not thereby become a street: *Heiple v. East Portland*, 13 Or. 97.

Road is a public highway; street is a road in a city or village: *Id.*

Use and improvement by a city of a road within the limits of the city is not sufficient to prove acquiescence of abutting owners in its use as a street for statutory period: *Id.*

Facts examined and held not to show intent to dedicate such road as a street: *Id.*

Charter requiring name of owner, or that owner is unknown, to be stated in the assessment roll in assess-

**Municipal Corporations** (continued).

ments for street improvements, an assessment to the name of a stranger to the title is void: *Dowell v. Portland*, 13 Or. 248; *Hawthorne v. East Portland*, 13 Or. 271.

After void assessment and sale, city cannot refund purchase-money, reassess and sell again; its power is exhausted in the first proceeding: *Id.*

Purchaser at such void sale takes nothing, and cannot recover back his money: *Id.*

In the absence of express authority, city cannot make a valid reassessment to cure defects: *Id.*

Assessment to B. F. Dowell, when Fanny Dowell was owner, is void: *Id.*

So, assessment to "J. C. Hawthorne, Est. of," although J. C. Hawthorne was dead at the time: *Hawthorne v. Portland*, 13 Or. 271.

Notice of street improvement must state definitely the kind of improvement proposed: *Id.*

Tax for street improvement is not against the person, but the property: *Seattle v. Yesler*, 1 W. T. 571.

Effect of provision in charter permitting city to take certificate of county clerk as to who is owner for the purpose of assessment: *Id.*

Party encouraging street improvement abutting his property is estopped to deny its legality: *Id.*

Common council can improve street only upon implied assent of abutting property owners, and must strictly follow the method indicated in its charter: *N. P. L. & M. Co. v. East Portland*, 14 Or. 3; *N. P. T. Co. v. Portland*, 14 Or. 24.

City cannot undertake to pay for such improvement out of its general funds, but may become liable generally, upon failure to strictly comply with the charter method of realizing the special fund: *Id.*

City cannot modify a contract for street improvement previously made: *Id.*

But complaint alleging such modification, which is denied by the answer, is good after verdict: *Id.*

Where six months have elapsed after completion of a contract, and city has neither approved or disapproved of the work, as provided by the contract, city cannot be

**Municipal Corporations** (continued).

heard to make objection that it has not yet acted thereon:  
Id.

Qualification of viewers must appear upon the record, and neither a finding by the council or the affidavit of the viewers will supply the defect: *N. P. T. Co. v. Portland*, 14 Or. 24.

Provision in charter that proceedings shall be deemed regular until contrary is shown applies only to proceedings had after jurisdiction is acquired: Id.

Grant by the legislature to a railroad of land in a city, previously dedicated to the public as a levee for depots and docks, held not inconsistent with the dedication: *P. & W. V. R. R. Co. v. Portland*, 14 Or. 188.

The right of municipality in its streets and public property is not absolute; the property is public, and the use thereof is within the control of the legislature: Id.

But the legislature cannot divert such property from the dedication; and upon such diversion any person interested is entitled to injunction to prevent it: Id.

Board of trustees of Olympia had power to vacate an alley on petition of all the abutting property owners: *Burmeister v. Howard*, 1 W. T. 207.

Upon vacation of street or alley, the fee to the soil vests in the abutting owners, unless other disposition is made thereof by petition of all abutting owners: Id.

If such other disposition be made, the lot-owners are estopped from setting up any right in contravention thereof: Id.

Upon replatting a block and alley, upon such petition, by city ordinance, the lot-owners are estopped from questioning rights acquired under such replatting: Id.

Boundaries fixed by ordinance in such replatting cannot be subsequently questioned, and all parties are charged with notice of the ordinance: Id.

Town in Washington Territory may make assessments for grading street a lien on property affected, but cannot make the tax a personal charge: *Seattle v. Yesler*, 1 W. T. 572.

The word "assessment" in the Organic Act is employed in a common and general sense: Id.

**Municipal Corporations** (continued).

Such assessments are not in violation of the provision requiring equality and uniformity in taxation: *Id.*

Town making assessments for street improvement must apportion to each lot its share of the whole cost in proportion as the value of each lot to the whole: *Id.*

Municipality must fix a method of determining such proportion and facts: *Id.*

The assessment in this case in neither uniform nor in accordance with the value of the property taxed: *Id.*

The ordinances regulating assessments are in violation of section 1924, Revised Statutes of the United States, and void: *Id.*

Sidewalks are part of streets: *Hutchinson v. Olympia*, 2 W. T. 314.

Provision in charter of Olympia, for petition of majority of property owners, or two thirds vote of council, applies to construction of sidewalks, and not to the repair thereof: *Id.*

**5. ACTIONS AND SUITS.**

Resident and tax-payer not competent juror in damage suit against city: *Garrison v. Portland*, 2 Or. 123.

Nor in action to lay out street, and assess damages and benefits: *Portland v. Kamm*, 5 Or. 362.

Verdict in such action must state damages and benefits separately: *Id.*

Appeal from the city council to the Circuit Court in such action is from the whole judgment, and the proceeding is tried *de novo*: *Id.*

Such verdict is sufficient if the amount of the damages and benefits can be ascertained therefrom: *Portland v. Lee Sam*, 7 Or. 397.

Corporation as plaintiff in action for public nuisance must allege and prove special damage: *Roseburg v. Abraham*, 8 Or. 509.

Evidence and instructions as to damages and benefits in action to lay out street: *Portland v. Kamm*, 10 Or. 383.

In pleading city ordinance (prior to 1885), it must be set out *in extenso* so far as relied on: *Pomeroy v. Lappeus*, 9 Or. 363; *Nodine v. Union*, 13 Or. 587.

In an action for damages for injury sustained upon a defective walk, evidence of repairs made by the city offi-



**Municipal Corporations** (continued).

cers, though not shown to be by order of the council, may go to the jury upon the question whether the *locus* was a city thoroughfare: *Sheridan v. Salem*, 14 Or. 328.

In proceeding to abate nuisance in one of its streets, city is clothed with the attributes of sovereignty, and may prosecute its suit in the first instance by bill in equity: *Moore v. Walla Walla*, 2 W. T. 184.

On defendant demurring in such suit on the ground that plaintiff has an adequate remedy at law, if the demurrer be overruled, plaintiff must demand jury trial, or he waives the objection: *Id.*

**Murder.** See Homicide.

**Mutual Covenants.** See Contracts; Deeds.

**Naturalization.**

One who obtains his final papers becomes a voter at time of naturalization: *Darragh v. Bird*, 3 Or. 229.

**Navigable Streams.** See Water and Watercourses.

**Necessaries.** See Husband and Wife.

**Negligence.** See Damages; Master and Servant; Municipal Corporations; Railroads.

1. GENERALLY.

2. PLEADING.

3. EVIDENCE.

4. CONTRIBUTORY NEGLIGENCE.

1. GENERALLY.

Carrier cannot limit his liability for negligence of himself or servants: *Seller v. Steamship Pacific*, 1 Or. 409.

Surgeon responsible for ordinary skill; what is ordinary skill: *Heath v. Glisan*, 3 Or. 64; *Boydston v. Giltner*, 3 Or. 118; *Williams v. Poppleton*, 3 Or. 139.

Not liable for error in judgment in case of doubt: *Id.*

Negligence of agent, when principal liable for personal injuries inflicted: *Oliver v. N. P. T. Co.*, 3 Or. 84; *French v. Cresswell*, 13 Or. 418

County liable for negligence of supervisor of roads in not repairing bridge: *McCalla v. Multnomah County*, 3 Or. 424; *Heilner v. Union County*, 7 Or. 83.

Liability of county for injury occasioned by defective bridge, under section 347 of the Code: *Id.*

City of Portland is not liable, under its charter, for injury

**Negligence** (continued).

occasioned by defective streets: *O'Harra v. Portland*, 3 Or. 525.

Employer providing and controlling machinery is bound to see that it is suitable: *Stone v. Oregon City Mfg. Co.*, 4 Or. 52.

If employee is injured by defect unknown to him, which employer might have cured by exercise of ordinary care, employer liable: *Id.*

Otherwise, where workman knowingly works with such defective machinery: *Id.*

Railroad train not bound to stop on seeing a man walking on the track; may presume he will get out of the way on sounding the alarm: *Cogswell v. Oregon and California R. R. Co.*, 6 Or. 417.

Owner of a steamboat is liable for injury to a passenger landing at an intermediate point, where the boat stops before reaching his destination: *Dice v. W. T. & L. Co.*, 8 Or. 60.

Liability of officers of a city for neglect to repair streets, where city is exempt by charter: *Rankin v. Buckman*, 9 Or. 253.

Of railroad company in negligently constructing and operating a ditch, whereby adjoining lands are overflowed: *Davidson v. Oregon and California R. R. Co.*, 11 Or. 136.

When negligence causing death is manslaughter: *State v. Justus*, 11 Or. 178.

Rule of liability of master for negligence of fellow-servants and vice-principals: *Willis v. Oregon R'y & Nav. Co.*, 11 Or. 257.

Foreman of a gang of laborers erecting a shed under the direction of a superior is a fellow-servant with the other laborers: *Id.*

In the absence of statute giving railroad company power to lease the road, the company is liable for the torts of the lessee thereof: *Lakin v. R. R. Co.*, 13 Or. 436.

Negligence of a construction company, occasioning death, in possession of and operating railroad for traffic purposes, employed by the owners of a railroad, renders the owners liable: *Id.*

Provision in city charter requiring claims to be presented

**Negligence (continued).**

to and audited by council does not apply to claim for damages for injury occasioned by neglect to repair street: *Sheridan v. Salem*, 14 Or. 328.

City is liable under section 347 of the Code (sec. 350, Hill's A. L.), for such injury, unless exempted by its charter: *Id.*

City is liable to the owner of an abutting lot for injury thereto by negligence of contractor in improving street, who is working under directions of city surveyor: *Seattle v. Buzby*, 2 W. T. 25.

The contractor is the servant of the city in such case, and the rule *respondeat superior* applies: *Id.*

Following the decisions of the United States Supreme Court, a city is liable for injury occasioned by neglect to keep streets in repair: *Hutchinson v. Olympia*, 2 W. T. 314.

**2. PLEADING.**

Statement in complaint against landlord for injuries to a person occasioned by the ill repair of the building, that plaintiff exercised due care, is insufficient; plaintiff must show that the unsafe condition of the building is not his fault: *Kahn v. Love*, 3 Or. 206.

In an action against a city for injury by defective sidewalk, notice of the defect, express or implied, must be alleged: *Mack v. Salem*, 6 Or. 275.

So in an action against a county for injury by defective bridge: *Heilner v. Union Co.*, 7 Or. 83.

Facts constituting the negligence must be alleged: *Id.*

Contributory negligence is a defense, and should be averred as such: *Grant v. Baker*, 12 Or. 329.

To recover exemplary damages, the complaint must show that the act was done maliciously, or was the result of willful misconduct, or reckless indifference to the rights of others: *Grant v. Baker*, 12 Or. 329.

**3. EVIDENCE.**

Expert's opinion of the general skillfulness of surgeon not admissible; otherwise as to the degree of skill used in the operation: *Heath v. Glisan*, 3 Or. 64; *Boydston v. Giltner*, 3 Or. 118; *Williams v. Poppleton*, 3 Or. 139.

Refraction of bone by surgeon is not of itself proof of bad surgery: *Boydston v. Giltner*, 3 Or. 118.

**Negligence** (continued).

But if done with gross ignorance, renders surgeon liable: *Id.*

Reputation for skill of surgeon not admissible: *Williams v. Poppleton*, 3 Or. 139.

The making of a quitclaim deed under the circumstances of the case was such evidence of negligence as to estop grantor from asserting after-acquired title: *Dorris v. Smith*, 7 Or. 267.

Price paid is no evidence of value of horses killed on railroad: *Holstine v. O. & C. R. R. Co.*, 8 Or. 163.

In action for injury to passenger, evidence of former accident at same place inadmissible: *Davis v. O. & C. R. R. Co.*, 8 Or. 172.

Burden of proof is on the party charging negligence: *Walsh v. Or. R'y & Nav. Co.*, 10 Or. 250.

What is "ordinary care" depends upon the particular circumstances: *Id.*

When negligence is presumed as a proposition of law, and when to be left to the jury: *Id.*

It is the right of the jury to weigh the evidence of negligence: *Id.*

Plaintiff need not prove absence of contributory negligence, in action for injury by falling off an elevated unguarded plank road: *Grant v. Baker*, 12 Or. 329.

Narrations of the circumstances immediately after ejection from a train, in the absence of defendant, are not admissible as part of the *res gestæ*: *Sullivan v. Or. R'y & N. Co.*, 12 Or. 392.

In action by person ejected from a train, he must prove not who was owner, but who was using the train at the time: *Id.*

Evidence that city officers improved the sidewalk at different times may go to the jury on the question whether the *locus* is a municipal thoroughfare: *Sheridan v. Salem*, 14 Or. 328.

Duty of trainmen to have greater care in passing a place where they know persons are accustomed to walk on the track: *Cassida v. O. R. & N. Co.*, 14 Or. 551.

Evidence of the fact that persons are in the habit of traveling up and down the track at the place where the acci-



**Negligence (continued).**

dent occurred should go to the jury on the question of negligence: *Id.*

**4. CONTRIBUTORY NEGLIGENCE.**

Slight negligence of plaintiff will not excuse gross negligence in the defendant: *Bequette v. People's Trans. Co.*, 2 Or. 200; *Holstine v. O. & C. R. R. Co.*, 8 Or. 163.

Action by tenant for injury from defects in building; plaintiff must show that the condition of the building is not his fault: *Kahn v. Love*, 3 Or. 206.

Plaintiff suing for damages must not have been guilty of contributory negligence: *Dufer v. Cully*, 3 Or. 377.

Person employed about dangerous machinery bound to use his thinking faculties: *Stone v. Or. City Mfg. Co.*, 4 Or. 52; *Hurst v. Burnside*, 12 Or. 520.

It is gross negligence for a deaf person to walk along a railroad track: *Cogswell v. Or. & C. R. R. Co.*, 6 Or. 417.

Slight negligence will not prevent recovery, where negligence complained of was gross: *Holstine v. O. & C. R. R. Co.*, 8 Or. 163.

Drunkenness of the plaintiff's intestate, unless the proximate cause, no defense: *Davis v. O. & C. R. R. Co.*, 8 Or. 172.

Passenger has no right to presume ferry-boat landed when chain-guard is down, when notified personally otherwise: *Id.*

Question of contributory negligence in brakeman in putting his head out of window of car should be left to the jury: *Walsh v. Or. R'y & Nav. Co.*, 10 Or. 250.

Contributory negligence is a defense, and should be pleaded as such: *Grant v. Baker*, 12 Or. 329.

Instruction as to duty of plaintiff to think and look while approaching dangerous machinery about which he was employed, held proper: *Hurst v. Burnside*, 12 Or. 520.

The plaintiff claiming that there was an emergency requiring prompt action, in which ordinary prudence could not be exercised, must ask instruction on that point, or he cannot complain if not given: *Id.*

The test is, whether a man of ordinary prudence would have done the act under all the circumstances: *Id.*

In an action by one injured while coupling cars loaded with projecting rails, held that upon the facts shown

**Negligence (continued).**

nonsuit should have been granted: *Scott v. Or. R'y & Nav. Co.*, 14 Or. 211.

Employee, continuing in an employment where extra hazardous modes of doing the business are adopted assumes the attendant risk: *Id.*

In such case, he cannot be heard to say he was exposed to danger of an unusual or extraordinary character: *Id.*

Same degree of prudence is not to be expected in a small child as in adults: *Cassida v. Or. R'y & Nav. Co.*, 14 Or. 551.

Evidence that, being frightened by cattle, the intestate, aged seven, sought refuge on the railroad trestle, where she was killed by defendant's train, is admissible to rebut contributory negligence: *Id.*

Failure of steamship to exhibit lights when approaching another, which is complying with the law in this respect, does not excuse the latter from faults contributing to collision: *Meigs and Talbot v. Steamship Northerner*, 1 W. T. 78.

Where both vessels contributed equally to the fault, the damage should be shared by both: *Id.*; *Puget Sound C. Co. v. Taylor*, 2 W. T. 93.

**Negotiable Instruments.** See Bills and Notes.

**New Trial.**

Affidavits of jurors will not be received to impeach their verdict: *Cline v. Broy*, 1 Or. 89; *Newby v. Territory*, 1 Or. 163; *Or. Cas. R. R. Co. v. Or. Steam Nav. Co.*, 3 Or. 178.

Omission of clerk to file bill of particulars, no ground for: *Id.*

Evidence must be new, not cumulative: *Cutter v. Steamship Columbia*, 1 Or. 101; *Lander v. Miles*, 3 Or. 40; *McKilver v. Manchester*, 1 W. T. 255.

Motion must be made in the trial court: *Id.*

Newly discovered evidence to impeach witness on former trial, no ground for new trial: *Territory v. Latshaw*, 1 Or. 146.

Where two courts have concurrent jurisdiction to grant, a party cannot apply to one, and on refusal, to the other, for new trial: *Newby v. Territory*, 1 Or. 163.

Not granted on doubtful and disputed questions of fact:

**New Trial** (continued).

Lander v. Miles, 3 Or. 40; Kearney v. Snodgrass, 12 Or. 311; Gore v. Moses, 1 W. T. 7.

Diligence must be shown, and that the new evidence could not have been had: *Id.*

Motion must be accompanied by affidavit of witness, or its absence accounted for: *Id.*

Evidence of material facts not proved or offered is not cumulative: *Id.*

"Made diligent inquiry," not sufficient in affidavit; facts must be stated: *Id.*

Where it is evident that the jury have disregarded instructions to injury of party, new trial granted: *Brown v. Cahalin*, 3 Or. 45.

Where there was some evidence of damage to the amount found, new trial denied: *Williams v. Poppleton*, 3 Or. 139.

Not granted merely because judge differs from jury as to preponderance of evidence: *Or. Cas. R. R. Co. v. Or. Steam Nav. Co.*, 3 Or. 178.

Twenty days after filing decision rendered in vacation allowed for filing motion for new trial: *Arrigoni v. Johnson*, 6 Or. 167.

Order granting or denying motion for new trial is not reviewable on appeal or error: *Bowen v. State*, 1 Or. 270; *State v. Fitzhugh*, 2 Or. 227; *State v. Wilson*, 6 Or. 428; *Hallock v. Portland*, 8 Or. 29; *State v. McDonald*, 8 Or. 113; *State v. Drake*, 11 Or. 396; *State v. Mackey*, 12 Or. 154; *Kearney v. Snodgrass*, 12 Or. 311; *State v. Becker*, 12 Or. 318; *Wississimi v. Territory*, 1 W. T. 6; *Smith v. United States*, 1 W. T. 262; *McCormick v. W. W. & C. P. R. R. Co.*, 1 W. T. 512; *Jones v. Wiley*, 1 W. T. 603; *Page v. Rodney*, 2 W. T. 461.

Such motion is addressed to the discretion of the court: *State v. Fitzhugh*, 2 Or. 227; *State v. Wilson*, 6 Or. 428; *Hallock v. Portland*, 8 Or. 29; *State v. McDonald*, 8 Or. 113; *State v. Drake*, 11 Or. 396; *State v. Mackey*, 12 Or. 154; *Kearney v. Snodgrass*, 12 Or. 311; *Tucker v. Flouring Mills Co.*, 13 Or. 28; *Gore v. Moses*, 1 W. T. 7; *Smith v. United States*, 1 W. T. 262; *Page v. Rodney*, 2 W. T. 461.

The order granting or refusing can be reviewed only in

**New Trial (continued).**

- case of abuse of discretion: *State v. Drake*, 11 Or. 396; *Gore v. Moses*, 1 W. T. 7; *Page v. Rodney*, 2 W. T. 461.
- Motion, on the ground that a juror was not a citizen, being denied, the order not reviewable on appeal: *State v. McDonald*, 8 Or. 113.
- Justice cannot set aside his judgment, and grant new trial: *Griffin v. Pitman*, 8 Or. 342.
- Motion and proceedings on, no part of the judgment roll, and not considered on appeal unless made a part thereof by bill of exceptions: *Or. R'y Co. v. Wright*, 10 Or. 162; *Chung Yow v. Hop Chong*, 11 Or. 220; *State v. Drake*, 11 Or. 396; *McAllister v. Territory*, 1 W. T. 360; but see *Kearney v. Snodgrass*, 12 Or. 311; *State v. Becker*, 12 Or. 318.
- Co-defendant jointly indicted, having been acquitted and become a competent and material witness, *quare*, whether it is ground for new trial: *State v. Drake*, 11 Or. 396.
- Motion for new trial, and exceptions based thereon, are not properly a part of a bill of exceptions; though made a part thereof cannot be reviewed on appeal: *Brown v. State*, 1 Or. 270; *Kearney v. Snodgrass*, 12 Or. 311; *State v. Becker*, 12 Or. 318; *Jones v. Wiley*, 1 W. T. 603.
- That juror drank intoxicating liquor during the trial, as a ground for new trial, will not be considered on appeal: *State v. Becker*, 12 Or. 318.
- Refusal of new trial for tampering with juror not reviewable on appeal: *Tucker v. Flouring Mills Co.*, 13 Or. 28.
- Courts should be reluctant to set aside verdict where there is evidence to support the verdict, or the evidence is of doubtful interpretation: *Gore v. Moses*, 1 W. T. 7.
- New trial should not be granted for newly discovered evidence, unless it is apparent such evidence would alter the verdict: *Leschi v. Territory*, 1 W. T. 13; *McKilver v. Manchester*, 1 W. T. 255.
- Where a party has duly excepted to a ruling, it is not necessary in order to preserve it that it should be renewed in a motion for new trial or in arrest of judgment: *Tollmie v. Dean*, 1 W. T. 46.



**New Trial (continued).**

New trial should not be granted when it is apparent by the proofs that it would avail nothing: *Id.*

Where there was some evidence to sustain verdict, court will not set it aside: *Williams v. Miller & Co.*, 1 W. T. 88.

Erroneous ruling that worked no prejudice, no cause for new trial: *Newberg and Abrams v. Farmer*, 1 W. T. 182.

What the newly discovered evidence relied on is, must be made clearly to appear: *McKilver v. Manchester*, 1 W. T. 255.

Legislature cannot, in Washington Territory, grant right of appeal from an order granting or refusing new trial: *McCormick v. W. W. & C. P. R. R. Co.*, 1 W. T. 512.

Provisions of chapter 1, page 20, acts of 1875, regarding petition for new trial after judgment, do not apply to criminal cases: *Thompson v. Territory*, 1 W. T. 548.

Motion for, based on insufficiency of the evidence or because the verdict is contrary to law, must be upon the written statement of the grounds relied on required by statute, section 582, Civil Practice Act: *Jones v. Wiley*, 1 W. T. 603.

If no such statement be made, the exception to the ruling of the court, refusing a new trial, is void, and a bill of exceptions based thereon fails: *Id.*

Exclusion of witness for drunkenness no ground for new trial, unless party shows the materiality of the testimony and applies to the court for a continuance until such time as witness will be able to testify: *Fox v. Territory*, 2 W. T. 297.

**Nonjoinder.** See Parties.

**Nonsuit.**

Not granted unless there is an entire lack of evidence to entitle plaintiff to recover: *Tippin v. Ward*, 5 Or. 450; *Southwell v. Beezley*, 5 Or. 458; *Salmon v. Olds and King*, 9 Or. 488; *Ward v. Moorey*, 1 W. T. 104.

Answer in equity held not sufficient pleading of counterclaim to prevent nonsuit: *Dove v. Hayden*, 5 Or. 500.

Where plaintiff's evidence is insufficient to sustain a verdict, nonsuit is properly granted: *Cogswell v. Or. & Cal. R. R. Co.*, 6 Or. 417.

**Nonsuit** (continued).

Error in overruling motion for, is waived by putting in evidence by way of defense, which supplies the defect in plaintiff's proof: *Bennett v. N. P. Express Co.*, 12 Or. 49.

Incompetent evidence, admitted without objection, is treated as competent on motion for nonsuit: *Jacobsen v. Siddal*, 12 Or. 280.

Must be such an entire failure of proof as would warrant the court in setting aside a verdict to authorize nonsuit: *Grant v. Baker*, 12 Or. 329.

The word "may" is construed as "must" in the statute providing that when the plaintiff on the trial fails to prove his case the court may dismiss: *Tolmie v. Dean*, 1 W. T. 46.

**Notice.** See Animals; Appeal and Error; Elections; Ferries; Forcible Entry and Detainer; Guardian and Ward; Highways; Jurisdiction; Landlord and Tenant; Liens; Pleading; Possession; Practice.

What sufficient posting of notice required to be posted at the court-house, before county commissioners had selected a court-house: *Drew v. Gant*, 1 Or. 197.

What sufficient notice of outstanding equities to put purchaser on inquiry: *Stannis v. Nicholson*, 2 Or. 332.

Purchaser, with notice of equitable rights, will not be permitted to protect himself against them: *Id.*

Notice of alteration of note, or circumstances sufficient to put payee on inquiry, will prevent his recovery against joint makers who did not consent to the alteration: *Willis v. Wilson*, 3 Or. 308.

Whatever is sufficient to put purchaser on inquiry operates as notice: *Bohlman v. Coffin and Carter*, 4 Or. 313; *Carter and Mason v. Portland*, 3 Or. 339; *Musgrove v. Bonser*, 5 Or. 313; *Richards v. Snyder and Crews*, 11 Or. 501; *Mann v. Young*, 1 W. T. 454.

Actual and unequivocal possession is notice of a claim of right or equities: *Id.*; *Skellinger v. Smith*, 1 W. T. 369.

Unrecorded deed carries title, as against subsequent purchaser with notice: *Musgrove v. Bonser*, 5 Or. 313.

Deed not entitled to record, but recorded, may operate as actual notice: *Id.*

**Notice (continued).**

Purchaser, without notice of defect of title, has lien for his improvements: *Hatcher v. Briggs*, 6 Or. 31.

In an action against a city for injury by defective sidewalk, notice must be alleged and proved: *Mack v. Salem*, 6 Or. 275.

Purchaser, without notice of claim of state for lien for costs in criminal case, takes the property freed from the lien, unless the judgment is docketed within reasonable time: *State v. Munds*, 7 Or. 80.

In an action against a county for injury by defective bridge, notice must be alleged and proved: *Heilner v. Union County*, 7 Or. 83.

No notice of intention to redeem land sold at tax sale is necessary: *Rich v. Palmer*, 7 Or. 133.

Where one buys land, he is presumed to buy with notice of the water rights in use thereon: *Coffman v. Robbins*, 8 Or. 278.

Constructive notice not imputed to purchaser in good faith at execution sale, where there is no judgment to support the same: *Hoxter v. Poppleton*, 9 Or. 481.

No notice need be proved against a purchaser of public lands, the title of which is already vested in another; rule of *caveat emptor* applies: *Wardwell v. Paige*, 9 Or. 517.

Attaching creditor stands in all respects as a *bona fide* purchaser as to notice of unrecorded deed: *Boehreinger v. Creighton*, 10 Or. 42.

Persons erecting improvements, with notice of adverse claim to the land, cannot complain of the loss he will suffer if owner is permitted to assert his rights: *Godard v. Parker*, 10 Or. 102.

Purchaser at execution sale, without notice of a claim of a grantee of the judgment debtor under a defective deed, has rights superior to such grantee: *Bloomfield v. Humason*, 11 Or. 229.

To set aside fraudulent conveyance, where a valuable consideration was paid, actual notice to the grantee must be proved: *Coolidge and McClaine v. Heneky and Forward*, 11 Or. 327.

But actual notice may be inferred from circumstances: *Id.*

**Notice (continued).**

Purchaser claiming protection of equity on the ground of good faith and the want of notice must plead and prove the facts independently of recitals in his deed: *Richards v. Snyder and Crews*, 11 Or. 501.

Purchaser under a quitclaim deed is not a *bona fide* purchaser without notice: *Baker v. Woodward*, 12 Or. 3.

Grantee of legal title, with notice of outstanding equitable interest, takes subject thereto: *Id.*

Judgment lien, taken with notice of prior unrecorded deed, has no priority: *Id.*

Quitclaim deed in chain of title operates as notice to purchaser sufficient to put him on inquiry: *Id.*

In contest between legal titles in ejectment, defendant may assume the burden and prove notice or want of consideration invalidating plaintiff's title: *McIntyre v. Kamm*, 12 Or. 253.

How far *lis pendens* operates as notice in Oregon: *Walker v. Goldsmith*, 14 Or. 125.

Formal notice of charges against a pilot need not be served upon him by the board of commissioners; sufficient if he have opportunity to explain and defend: *Snow v. Reed*, 14 Or. 342.

Possession under color of title operates as notice to the extent of the defined boundaries: *Phillippi v. Thompson*, 8 Or. 428; *Joy v. Stump*, 14 Or. 361.

Actual notice includes knowledge of facts sufficient to put upon inquiry: *Manaudas v. Mann*, 14 Or. 450.

Possession under unacknowledged deed operates as actual notice: *Id.*

Party in court must take notice of all orders made in the case and the filing of all pleadings: *Williams v. Miller & Co.*, 1 W. T. 88.

Duty of consignee to give notice to carrier when, on receiving goods by freight, he discovers that they were damaged in transit: *Williams v. Steamship Columbia*, 1 W. T. 95.

Privy to a deed is bound by the notice it imparts, whether possessed of actual notice or not: *Skellinger v. Smith*, 1 W. T. 369.

Open, notorious, and exclusive possession is notice to the world of the title of the one in possession: *Id.*



**Notice (continued).**

Purchaser is fairly chargeable with information which he would have obtained by inquiring into matters brought to his notice: *Shockley v. Brown*, 1 W. T. 454.

Actual prior notice of unrecorded chattel mortgage does not give such mortgage precedence over the attachment of a creditor of the mortgagor: *Baxter v. Smith*, 2 W. T. 97.

**Notice to Quit.** See Landlord and Tenant.

**Novation.**

Where contract to pay debt of another is founded on new consideration, subsisting liability of original debtor no defense: *Hedges v. Strong*, 3 Or. 18; *Ludwick v. Watson*, 3 Or. 256.

Agreement to substitute another agreement, void unless carried into execution and accepted in satisfaction: *Smith v. Foster*, 5 Or. 44.

Contract based on agreements involving other parties not valid, except there has been a novation: *Shattuck v. Smith*, 5 Or. 125.

A promise by A, for valuable consideration to pay his debt due B to C, can be enforced against A by C: *Baker and Smith v. Eglin*, 11 Or. 333.

**Nuisances.**

Individual may maintain injunction suit for nuisance, where specially and irreparably damaged: *Parrish v. Stephens*, 1 Or. 73; *Luhrs v. Sturtevant*, 10 Or. 170.

Requisites and sufficiency of indictment for maintaining: *State v. Bergman*, 6 Or. 341; *State v. Hume*, 12 Or. 133.

Authority by charter and ordinance in city to punish for, does not oust jurisdiction of state courts: *Id.*

In an action to abate, where plaintiff recovers damages, he is entitled to a warrant to have the nuisance abated: *Marsh v. Trullinger*, 6 Or. 356.

Damages for a nuisance in damming a stream and overflowing plaintiff's land: *Id.*

Person specially damaged by obstructing highway with a toll-gate may recover: *Milarkey v. Foster*, 6 Or. 378.

What allegations are sufficient to show special damage in such case: *Id.*

Costs under section 539, subdivision 1, of the Code (sec.

**Nuisances (continued).**

549, Hill's A. L.), should be awarded to the party who recovers judgment, the right to the possession of realty being in issue in the action: Bentley v. Jones, 7 Or. 108.

Complaint in action for damages for public nuisance must show special damage to the plaintiff: Roseburg v. Abraham, 8 Or. 509; Luhrs v. Sturtevant, 10 Or. 170.

Corporation as plaintiff in such action stands on the same footing as private person: Luhrs v. Sturtevant 10 Or. 170.

To divert or obstruct watercourse is a private nuisance for which equity affords remedy: Shively v. Hume, 10 Or. 76.

Complaint held not sufficient to warrant interference with public nuisance at suit of private person: Luhrs v. Sturtevant, 10 Or. 170.

When equity will enjoin maintaining obstructions in public highway: Id.; Smith v. Gardner, 12 Id. 221; Walls v. Foster, 13 Or. 247.

Affidavits filed with motion for order to abate are part of the judgment roll and transcript on appeal: Ankeny v. Fairview Milling Co., 10 Or. 390.

Such order must not order defendant to abate in particular manner, but must simply order a warrant to abate to issue: Id.

Duty of sheriff to remove nuisance with as little injury as possible: Id.

In making order to abate, court may describe the nuisance from its own knowledge derived from the facts proved on the trial, though the record does not identify: Id.

Indictment for obstructing highway; when *termini* must be alleged and proved: State v. Hume, 12 Or. 133.

On verdict for plaintiff, warrant to abate does not issue as a matter of course: Kothenberthal v. City of Salem Co., 13 Or. 604.

In such case, it may appear to the court that the nuisance has ceased or the remedy is inadequate, and the party may be left to seek an effective remedy in equity: Id.

A city proceeding to abate a nuisance is clothed with attributes of sovereignty, and may prosecute its suit in the

**Nuisances** (continued).

first instance by bill in equity: *Moore v. Walla Walla*, 2 W. T. 184.

If defendant demurs to the complaint in such case on the ground that plaintiff has a remedy at law, on the overruling of his demurrer and before going to trial he must demand a jury trial, or he waives the objection: *Id.*

**Nunc pro Tunc Orders.** See Courts; Judges; Judgments and Decrees; Jurisdiction; Practice.

**Oath.** See Affidavit; Jury and Jury Trial.

**Obstructing Highways.** See Nuisances.

**Occupant.** See Adverse Possession; Landlord and Tenant; Public Lands.

**Offices and Officers.** See Assessors; Board of Commissioners for Erection of Penitentiary; Centennial Commission; Compensation; Constables; Corporations; Deputy; Elections; Executions, and Proceedings Supplemental; Jailer; Jurisdiction; Mandamus; Municipal Corporations; Quo Warranto; Schools; Sheriffs; Taxation.

Legislature can change term, after office is filled, from two years to one: *Territory v. Pyle*, 1 Or. 149.

One who claims a right by virtue of being a public officer must show that he is such *de jure*: *Id.*

Contrary to public policy for officer to use his appointing power to place himself in office: *State v. Hoyt*, 2 Or. 246.

Offices of city marshal and city councilman are inconsistent, and cannot be held by same person: *Id.*

Where an officer is known and recognized as having authority, court presumes he acts within his jurisdiction: *Dennison v. Story*, 1 Or. 272; *Roy v. Horsley*, 6 Or. 270.

Legislature may control unearned emoluments, except where prohibited expressly: *Bird v. Wasco Co.*, 3 Or. 282.

Appointee to fill vacancy of county judgeship, holds until next general election only: *State v. Johns*, 3 Or. 533.

The term attaches to the person elected to fill the same: *Id.*

Term of person elected county judge continues four years, unless terminated by death or resignation: *Id.*

**Offices and Officers** (continued).

The right to try a contest for a municipal office does not pertain to a municipality by implication from its right to elect its officers, nor from its general power to pass ordinances to carry into effect the provisions of the charter: *Robertson v. Groves and Corvallis*, 4 Or. 210.

The presumption is, that officer was regularly appointed, and that his duty has been regularly performed: *Dolph v. Barney*, 5 Or. 192.

Officers clothed with statutory power to do an act for benefit of the public, to perform the act becomes a duty, though statute is permissive in its terms: *Springfield Milling Co. v. Lane Co.*, 5 Or. 265; *Rankin v. Buckman*, 9 Or. 253; *Hutchinson v. Olympia*, 2 W. T. 314.

Where an officer's bond is lost and copy cannot be had, a person damaged by official delinquency of an officer may have complete relief in equity: *Howe v. Taylor*, 6 Or. 284; *S. C.*, 9 Or. 288.

Right of a judge to sit cannot be objected to in criminal case on appeal, unless taken in the trial court: *State v. Whitney*, 7 Or. 386.

The right to judicial office cannot be questioned collaterally in the trial of a criminal case before the court: *Id.*

Circuit Court will entertain proceedings under section 354 of the Code (sec. 357, *Hill's A. L.*), in the nature of *quo warranto*, notwithstanding a municipal board has been given the right to judge of the election of its members: *State v. McKinnon*, 8 Or. 493.

But where the charter confers exclusive power in this respect on the municipal tribunal, its decision will not be reviewed: *Simon v. Portland Com. Council*, 9 Or. 437.

Offices of circuit and supreme judges under act of 1878, providing for their election in distinct classes, were created by the act, and *ipso facto* became vacant: *Cline and Newsome v. Greenwood and Smith*, 10 Or. 230.

An existing vacant office may be filled by the governor during the *interim*: *Id.*

Legislature has absolute control of the matter of compensation of public officers: *Portland v. Besser*, 10 Or. 242.

Executive officer charged with exercise of judicial functions is responsible only for proper attention and good faith: *State v. Chadwick*, 10 Or. 465.



**Offices and Officers** (continued).

Governor having resigned, secretary of state succeeding to the duties of the office by the constitution, and continuing to discharge the duties as secretary of state, is entitled to salary as governor: *Chadwick v. Earhart*, 11 Or. 389.

Ceasing to be secretary of state, he is entitled to the office and emoluments as governor, until the successor is duly elected: *Id.*

Term of circuit judge is six years, but person elected during an unexpired term holds, not for six years, but for remainder of term: *State v. Ware*, 13 Or. 380.

Policeman ousted by mayor and common council, without sufficient cause, and another appointed in his place, may maintain *quo warranto* against the intruder: *Selby v. Portland*, 14 Or. 243.

*Quare*, whether writ of review would not lie to obtain reversal of the action: *Id.*

But until there is an adjudication in a direct proceeding, adjudging him entitled to the office, he cannot sue the city for the salary: *Id.*

A judicial district having been abolished by order of the judges, pursuant to statute, the clerk of the District Court in said district, from the date of the order, lost his legal existence, and all his subsequent acts as clerk were nullities: *Boyer v. Fowler*, 1 W. T. 101.

Register of United States local land-office is a public officer, and his record may be proved by certified copies: *Ward v. Moorey*, 1 W. T. 104.

The acts of the person holding said office cannot be impeached collaterally: *Id.*

Act of Congress, 1869, regulating elections in Washington Territory, had the effect of changing the time for election of county and other officers: *Davidson v. Carson*, 1 W. T. 307.

Legislative assembly and Congress possess the power of lengthening or shortening the terms of officers elected solely under the laws of the territory: *Id.*

Terms of officers elected at general election of 1869 are not changed by said act of Congress, changing time for election to June, 1870: *Id.*

The authority of a notary *de facto*, to take the acknowl-

**Offices and Officers** (continued).

edgment of a deed, cannot be questioned collaterally:  
Bullene v. Garrison, 1 W. T. 587.

Retired army officer of United States army belongs to the army within section 1860, Revised Statutes of the United States, and is disqualified from holding office in Washington Territory: Hill v. Territory, 2 W. T. 147.

Information in the name of the territory is the proper method of ousting one unlawfully holding office under the laws of the territory: Id.

Election of a person to office, so disqualified at the time of his election, is not rendered valid by a repeal of the statute disqualifying him: Id.

Section 1222 of the United States Revised Statutes, prohibiting all officers on the active list from holding civil office, does not repeal that part of section 1860 which forbids officers on the retired list from holding office in the territories: Id.

Officers on the retired list are, by section 1094, Revised Statutes, expressly declared a constituent part of the army, and so has the United States Supreme Court decided: Id.

**Official Bonds.** See Bonds and Undertakings.

**Oleomargarine.** Instruction as to intent to offer for sale, in exposing in common salesroom, unmarked, held not erroneous: State v. Dunbar, 13 Or. 591.

So exposing the same is an act from which the intent to sell may be inferred: Id.

**Onus Probandi.** See Evidence.

**Opinion Evidence.** See Evidence.

**Ordinances.** See Municipal Corporations.

**Pardon.** Does not restore one convicted of felony to civil rights and right to vote: Darragh v. Bird, 3 Or. 229; *contra*, Wood v. Fitzgerald, 3 Or. 568.

Article 2, section 3, state constitution, no restriction on effect of pardon: Wood v. Fitzgerald, 3 Or. 568.

**Parent and Child.** See Infants.

No liability to pay wages to son under twenty-one years voluntarily returning to father's farm, after having been given privilege to go and work for himself: Albee v. Albee, 3 Or. 321.

**Parent and Child** (continued).

Son over twenty-one, working on father's farm, when entitled to recover for labor: *Id.*

Parent not liable even for necessities furnished minor without authority express or implied: *Carney v. Barrett*, 4 Or. 171.

No agreement implied in law that father will pay daughter living in family for services as housekeeper: *Barrett v. Barrett*, 5 Or. 411.

Putative father of a bastard is not liable on his naked promise for its support: *Nine v. Starr*, 8 Or. 49.

Mother of such child is its guardian, and is bound to maintain it: *Id.*

Where a father takes deed to land in the name of his infant son, and goes into possession and improves, his possession is the son's possession: *Lawrence v. Lawrence*, 14 Or. 77.

Influence of parent is presumed so long as the dominion of the parent lasts: *Baldock v. Johnson*, 14 Or. 542.

This, though the daughter, seventeen years of age, is recently married, but still resides with her parent: *Id.*

**Parol Evidence.** See Evidence.

**Parties.** See Appeal and Error; Contracts; Deeds; Estoppel.

Demurrer lies for misjoinder of parties defendant: *White v. Delschneider*, 1 Or. 254; *contra*, *Powell v. Dayton etc. R. R. Co.*, 13 Or. 446.

If the court can make a decree not prejudicial to the rights of parties, the objection to the misjoinder of parties will not prevail: *Id.*

Legal title to mortgaged property being in wife, she is necessary party to foreclosure: *Fahie v. Pressy*, 2 Or. 23.

Judgment debtor, or his representatives after his death, are proper parties to object to confirmation of sheriff's sale: *Miller v. Bank of British Columbia*, 2 Or. 291.

After mandate sent below, Supreme Court will not hear motion to substitute parties: *Boon v. McClane*, 2 Or. 331.

Corporation must bring in all owners in action to condemn land: *Willamette Falls C. & L. Co. v. Kelly*, 3 Or. 99.

Junior and subsequent lien claimants proper parties in

**Parties** (continued).

suit to foreclose mortgage: *Besser v. Hawthorne*, 3 Or. 129; S. C., 3 Or. 512.

One not made party not bound, and may afterward foreclose: *Besser v. Hawthorne*, 3 Or. 512.

One of makers of joint note has a right to have the others made parties: *Kamm v. Harker*, 3 Or. 208.

In a complaint against a married woman, she may be treated as a *feme sole*; she must plead her coverture: *Kennard v. Sax*, 3 Or. 263.

New parties being suggested by the answer, amendment of complaint allowed to make them defendants: *McCown v. Hannah*, 3 Or. 302.

Trustees of unincorporated religious society may sue for the benefit of the society: *Trustees v. Adams*, 4 Or. 76.

Administrator has no power to sue to set aside decedent's deed without order of court: *King and Lownsdale v. Boyd*, 4 Or. 326.

Complaint by trustee of an express trust should show for whose benefit he sues: *Holladay v. Davis*, 5 Or. 40.

Judgment creditors may unite in suit to set aside fraudulent conveyance: *Elfelt v. Hinch*, 5 Or. 255.

Petitioners and remonstrators are the only parties to proceedings in County Court to lay out road: *C. & G. Road Co. v. Douglas County*, 5 Or. 280.

Third party holding legal title of realty fraudulently conveyed is a proper party defendant in divorce suit: *Wetmore v. Wetmore*, 5 Or. 469.

Minors are not adversary parties to guardian in proceedings before County Court for leave to mortgage minor's property: *Trutch v. Bunnell*, 5 Or. 304; but see S. C., 11 Or. 58.

Plaintiff having died, objection that executrix is not duly qualified to sue must be taken by plea in abatement, or is waived: *Murray v. Murray*, 6 Or. 26.

Such executrix, being also legatee, and the successor in interest in the subject-matter of the suit, is qualified to sue under section 37 of the Code (sec. 38, Hill's A. L.): *Id.*

Application for continuance of cause in the name of the personal representatives of a deceased party, if made within a year, is in time, though the order be not made



**Parties (continued).**

- until after the expiration of the year: *Dick v. Kendall*, 6 Or. 166.
- United States is not subject to process or jurisdiction of state court: *Goldsmith v. The Revenue Cutter*, 6 Or. 250.
- Having failed to acquire jurisdiction of defendant, and having rendered void judgment, justice may issue *alias* summons and proceed: *Knapp v. King*, 6 Or. 243.
- Finding of fact by the court is conclusive upon parties to the suit in favor of persons not parties: *Knott v. Knott*, 6 Or. 334.
- Stipulation for a decree affecting the property rights of all the parties to a suit, but not entered into by all, is inoperative, and cannot be enforced: *Adams v. Wilson*, 6 Or. 391.
- Heirs are necessary parties defendant in foreclosure suit against executors: *Renshaw v. Taylor*, 7 Or. 315.
- If the action or proceeding can be determined without them, other parties cannot be brought in: *Tichenor v. Coggins*, 8 Or. 270.
- Persons holding possession, and claiming adversely to plaintiff's rights, may be made defendants in suit by divorced wife against husband for one third of his property: *Weiss v. Bethel*, 8 Or. 522.
- Objection to plaintiffs suing jointly cannot be taken for first time in Supreme Court: *Stingle v. Nevel*, 9 Or. 62.
- Board of directors of the state university are a corporation, and not mere agents of the state, and may be sued without joining the state as a party: *Dunn v. State University*, 9 Or. 357.
- The immunity of the state from being sued applies only to its being made a party to the record; its agents holding title and possession of property may be sued concerning the same: *Id.*
- Actions by or against a county must be brought in the name of the county: *Weiss v. Jackson Co.*, 9 Or. 470; *Wood v. Riddle*, 14 Or. 254.
- Parties whose interests and damages are distinct, damaged by injunction, may sue at law upon the bond jointly or severally, though the injunction is joint: *Ruble v. Coyote G. & S. M. Co.*, 10 Or. 39.

**Parties (continued).**

Tax-payer is entitled to sue in equity to prevent fraudulent or illegal disposition of county funds, and county need not be a party: *Carman v. Woodruff*, 10 Or. 133; *White v. Com. Multnomah County*, 13 Or. 317.

Private relator in *quo warranto* is not a party, and cannot control the proceedings: *State v. Douglas County Road Co.*, 10 Or. 198.

Private parties cannot use the name of the state to try out a question of title between themselves by *quo warranto*: *Wilson and Wakeman v. Shively*, 10 Or. 267.

State is proper party to bring suit against custodians of school funds for an accounting: *State v. Chadwick and Brown*, 10 Or. 423.

An appeal will not be dismissed for want of necessary parties, where a decision can be made respecting the parties to the appeal, and not affecting the rights of other persons not made parties: *Poppleton v. Nelson*, 10 Or. 437.

Person for whose benefit a contract is made may sue upon it: *Hughes v. Or. R'y & Nav. Co.*, 11 Or. 437.

In a suit by a creditor to hold a stockholder individually liable, it is not necessary to make all creditors and stockholders parties: *Brundage v. Mon. G. & S. M. Co.*, 12 Or. 322.

In such suit, if a defendant stockholder wants other stockholders made parties, he must bring them in at his own expense by answer or otherwise: *Id.*

But in a suit to wind up the affairs of an insolvent corporation, all creditors and stockholders are necessary parties: *Id.*

Defendants in a suit for joint tort are not liable on proof of several conversions: *Dahms v. Sears*, 13 Or. 47; *Cooper v. Blair*, 14 Or. 255.

Sheriff and several attaching creditors under separate attachments are not properly joined as defendants for conversion: *Id.*

In an action on a joint obligation, judgment may be had against one defendant proved liable, where the others are proved not liable: *Ah Lep v. Gong Choy*, 13 Or. 205; *Fisk v. Henarie*, 14 Or. 29.

Demurrer for defect of parties lies when on the face of the complaint the presence of other parties appears necessary: *Cohen v. Ottenheimer*, 13 Or. 220.

**Parties (continued).**

Demurrer to the complaint as not stating facts sufficient is the remedy when too many parties are brought in: *Id.*

In *mandamus*, where the matter is of public interest as to a violation of a public duty, relator need show no other interest than as a citizen and a voter: *State v. Ware*, 13 Or. 380.

Misjoinder of parties plaintiff is not ground for demurrer in Oregon: *Powell v. Dayton etc. R. R. Co.*, 13 Or. 446.

Co-tenants cannot join as plaintiffs in ejectment, but the defect is waived by answering over: *Minter v. Durham*, 13 Or. 470.

Co-tenants jointly contracting with a broker are properly joined as defendants in an action for breach of the contract: *Fisk v. Henarie*, 14 Or. 29.

The contract, and not the fact of their co-tenancy, determines their joint or several liability: *Id.*

Person purchasing property for the use of, and at the instance of, another, is a trustee of an express trust, and can sue regarding it in his own name: *Hexter v. Schneider*, 14 Or. 185.

County is necessary party in proceedings for review of judicial action of the County Court in county business: *Wood v. Riddle*, 14 Or. 254.

To enable plaintiff to join several tort-feasors as defendants in one action, some community in the wrong-doing must exist between them: *Cooper v. Blair*, 14 Or. 255.

Different persons, taking wheat from a warehouse at different times without concert of action, cannot be joined as defendants in action for the conversion: *Id.*

Where, on trial, plaintiff fails to prove his case as to some of the defendants, it seems he can amend his complaint by omitting them: *Id.*

On a contract of guaranty, principal and guarantor are severally liable, and should not be joined as defendants: *Tyler v. T. of T. A. & P. U.*, 14 Or. 485.

Where several defendants have been improperly joined in a suit on contract, it is the duty of the plaintiff to elect which he will proceed against: *Id.*

Objection of non-joinder should be taken at the proper stage of the proceedings: *Gove v. Moses*, 1 W. T. 7.

**Parties** (continued).

No binding order can be made on persons not parties to the suit: *Madison v. Madison*, 1 W. T. 60.

A brought suit against B for damage to his crops by cattle of B; it was error, upon the trial, for the court to summarily dismiss the suit on account of the non-joinder of C, who had an interest in the crops: *Washburn v. Case*, 1 W. T. 253.

The interest of C in such case might be consistent with the right of A to recover for the trespass, and at most would amount to a partial failure of proof: *Id.*

Surviving partner, and not the executor, is proper party defendant, in the absence of statute, in suit for a partnership debt: *Barlow and Shepherd v. Coggan*, 1 W. T. 257.

Indian can be sued as defendant upon a contract which he is not prohibited by statute from making: *Gho v. Jules*, 1 W. T. 325.

Where proceedings are instituted to compel the members of the board of county commissioners to perform duties devolving upon them by law, not as a board but as individuals, the county is in no sense a party: *Kitsap Co. v. Carson*, 1 W. T. 419.

Married woman can maintain libel *in rem*, for injury to her person by negligence on shipboard, in admiralty: *Phelps v. Panama*, 1 W. T. 518.

Objection that her husband joins her in such suit cannot first be taken advantage of in the Supreme Court: *Id.*

The name of a party unnecessarily inserted in a libel should, if motion be made therefor at proper stage of the case, be stricken out; otherwise, it will not be noticed: *Id.*

When new parties should be brought in on proceedings supplemental to execution: *Murne v. Schwabacher Bros. & Co.*, 2 W. T. 130; *S. C.*, 2 W. T. 191.

In action by an administrator against a son of the deceased for conversion of funds of the estate, a brother of defendant is not a party in interest as to the record, and may testify as a witness: *McCoy v. Ayers*, 2 W. T. 307.



**Partition.**

County Court has no authority to partition real estate of decedent: *Hanner v. Silver*, 2 Or. 336; *Hatcher v. Briggs*, 6 Or. 31; *Burnside v. Savier*, 6 Or. 154.

Particular property must be designated, and the interest of the persons, in a complaint in partition: *Id.*

Order directing partition or sale, without further proceedings, under statute of 1855, is not a final order, and not notice to parties and privies: *Bybee v. Summers*, 4 Or. 354.

Authority of County Court to partition was abrogated by act of 1862: *Hatcher v. Briggs*, 6 Or. 31.

Administrator has no power to partition real property of partnership: *Burnside v. Savier*, 6 Or. 154.

Complaint must allege plaintiff is in possession: *Farris v. Hayes*, 9 Or. 81.

Rule that possession of one co-tenant is the possession of all is overcome by showing that such co-tenant claims to own the whole under color of title: *Id.*

Partition does not affect rights of a mortgagee in the undivided half owned by his mortgagor, except to sever the interest without disturbing the lien: *Board S. L. Com. v. Wiley and Davis*, 10 Or. 86.

Decree which ascertains and determines rights of the parties, and leaves nothing to be done but to appoint referee, etc., to carry it into effect, is final decree, and appeal lies therefrom: *Walker v. Goldsmith*, 14 Or. 125.

Questions of fact can be tried only upon issue joined, as in other suits: *Id.*

Partition by Probate Court as a judicial proceeding is void, but the parties consenting, the adults by appearance in person, and the minors by guardians, they and their successors in interest are bound: *Brazee v. Schofield*, 2 W. T. 209.

Partial partition, consummated by possession in severalty, confirmed by long acquiescence and many changes of title, will not be disturbed in equity: *Id.*

**Partnership.**

Firm name signed to bond binds partner signing only, unless the firm assent: *Charman and Warner v. McLane*, 1 Or. 339.

Confession of judgment by one partner binds him only, unless in action pending: *Richardson v. Fuller*, 2 Or. 179.

**Partnership** (continued).

Effect of signing firm name to note and mortgage by one partner with knowledge of the other: *Chavener v. Wood*, 2 Or. 182.

Partner sued on joint note may plead in abatement non-joinder and misjoinder: *Kamm v. Harker*, 3 Or. 208.

Partnership cannot sue or be sued; the individual members are the parties: *Id.*

Receiver not appointed, unless there is danger of ultimate loss of the property: *Wellman and Peck v. Harker*, 3 Or. 253.

On a contract to purchase real property by partners, when survivor is entitled to special performance: *Knott v. Stephens*, 3 Or. 269.

Accounting, when partner entitled to, and what complaint must show: *Holladay v. Elliott*, 3 Or. 340.

Effect of docketing judgment in partnership name: *Dearborn v. Patton*, 3 Or. 420.

Partnership partly relating to land is valid though not in writing: *Knott v. Knott*, 6 Or. 142.

Such partnership may be proved by parol: *Id.*

Partner taking ferry and franchise in his own name, purchased with partnership property for the firm, held a trustee for the firm: *Id.*

Administrator has no power to partition real estate of partnership: *Burnside v. Savier*, 6 Or. 154.

Dissolution may be had in equity when business becomes impracticable without great loss: *Holladay v. Elliott*, 8 Or. 84.

Referee for an accounting should ascertain what the profits were, not what they should have been: *Boire v. McGinn*, 8 Or. 466.

When the books fail to show the profits, experts cannot testify what they should have been: *Id.*

Profits may be calculated from amount of goods sold at the rate of profit proved: *Id.*

Entries in books where both partners have access to them are *prima facie* correct as between them: *Id.*

Dissolution and division without fraud vests the property in each partner individually: *McKinney v. Baker*, 9 Or. 74.

Goods formerly belonging to firm, but after such division

**Partnership** (continued).

- held by one partner, are not partnership goods that will not pass to his assignee for all his creditors: *Id.*
- Dissolution agreement held not executory, though one partner assumed debts to be paid in the future: *Id.*
- Dissolution partly consummated, equity will take jurisdiction for an accounting, and to ascertain amounts due on final settlement: *Gleason v. Van Aernam*, 9 Or. 343.
- Final settlement as a defense in such suit must be pleaded: *Id.*
- Partner is not entitled to compensation for his services, unless by contract expressed or implied: *Mann v. Flanagan*, 9 Or. 425.
- Liability of persons on a note signed with a partnership name by one of them: *Kearney v. Snodgrass and Minor*, 10 Or. 181; *S. C.*, 12 Or. 311.
- Definition of partnership: *Cogswell v. Wilson*, 11 Or. 371; *Bloomfield v. Buchanan*, 13 Or. 108.
- Does not depend on the fact that each partner has in all things kept the partnership agreement, and may exist notwithstanding: *Id.*
- Two partnerships, composed of same individuals in part, cannot sue each other at law: *Beacannon v. Liebe*, 11 Or. 443.
- But the assignee of the claim of one such firm against the other, where no accounting is necessary to fix the amount, may sue at law thereon: *Id.*
- Principle denying corporations' power to become partners: *Hackett v. Multnomah County*, 12 Or. 124.
- Partnership articles providing for a division of the proceeds of the partnership property in case of a sale thereof before the expiration of the partnership, one of the partners cannot be deprived of his share without his consent: *Moore v. Knott*, 12 Or. 260.
- Incoming partners are liable on a contract previously made but assumed by the new partnership, though the other party did not know they were partners: *Kearney v. Snodgrass*, 12 Or. 311.
- Not necessary that there be an express stipulation to share profit and loss to constitute partnership: *Bloomfield v. Buchanan*, 13 Or. 108.
- Partnership not liable for money borrowed by one of the

**Partnership** (continued).

partners on his own account representing that it is to be used in the partnership business: *Ah Lep v. Gong Choy*, 13 Or. 205.

Lender must have understood that he was dealing with the firm through the partner as agent of the firm: *Id.*

In an action in which it is in issue whether certain accounts had been transferred on the partnership books to the credit of one of the partners, the books are evidence of the fact: *Moore v. Knott*, 14 Or. 35.

In suit for accounting, partners are usually severally liable, but not jointly: *Bloomfield v. Buchanan*, 14 Or. 181.

But where there is a concerted action among some of the partners to exclude one from the profits, they are both jointly and severally liable: *Id.*

In the absence of statute, surviving partner has complete control of the partnership effects; suits may be brought by or against him for partnership demands and liabilities: *Barlow and Shepherd v. Coggan*, 1 W. T. 257.

Remedy cannot be had against executor of deceased partner, unless firm property is insufficient to pay the claim: *Id.*

When one of the makers of a note dies before the maturity of the note, presentment and demand should be made on the surviving maker, and not the executor of deceased partner: *Id.*

Such claim need not be presented to administrator before suit, for the reason that the surviving partner has the same knowledge of the debt that the deceased had: *Id.*

Surviving partner on having to pay the whole of joint debt may reimburse himself out of the deceased partner's share of the firm property: *Id.*

One partner cannot sue his copartner in a court of law for a recovery upon an unsettled partnership indebtedness: *Stevens v. Baker*, 1 W. T. 315.

**Part Performance.** See Contracts; Specific Performance; Statute of Frauds.

**Party-walls.** See Boundaries.

**Patents.** See Public Lands.

**Paupers.** Under the statute, a complaint to charge the county for the support of a pauper, must show that the



**Paupers (continued).**

county board have recognized the person as a pauper:  
*Collins v. King County*, 1 W. T. 416.

Such complaint should show a compliance, by the one  
 suing, with the expressed statute: *Id.*

No action on implied contract to reimburse one for sup-  
 porting a pauper will lie until there has been affirma-  
 tive action by the board, which must be pleaded: *Id.*

Such complaint must show the claim was presented and  
 disallowed by the board: *Id.*; *King County v. Collins*  
 and *Condon*, 1 W. T. 469.

*Quære*, whether the complaint should show that the  
 pauper had no relatives bound to support him: *Id.*

Entry in records of commissioners of King County, show-  
 ing that Snohomish County is called on to remove cer-  
 tain paupers of the latter county kept in King County,  
 is not evidence to hold King County liable for such  
 keeping: *King County v. Collins and Condon*, 1 W. T.  
 469.

Such record only shows King County not liable: *Id.*

No recovery can be had against a county for the keeping  
 of paupers, until it is proved that the county board  
 have adjudicated such persons paupers, and authorized  
 plaintiff to keep them as such: *Id.*

**Payment.** See *Contracts*; *Mortgages*; *Statute of Limita-*  
*tions*; *Tender*.

State has power to require taxes paid in coin, and such  
 is the law in Oregon: *Whiteaker v. Haley*, 2 Or. 128.

Officer's fees may be paid in currency, and clerk has no  
 right to demand coin: *Coffin v. Coulson*, 2 Or. 205.

Payment by one joint debtor of part of the debt revives  
 the debt as to all the debtors: *Partlow v. Singer*, 2 Or.  
 307.

Limitation begins to run from date of payment: *Id.*

Note in possession of maker, presumed paid; presumption  
 disputable: *Hedges v. Strong*, 3 Or. 18.

Payment of consideration in deed may be disputed by  
 parol: *Brown v. Cahalin*, 3 Or. 45.

Mere readiness to pay, without tender, not sufficient  
 where tender is essential: *Smith v. Foster*, 5 Or. 44.

Deferred payments become due at once on breach of con-  
 tract by party liable: *Monroe v. N. P. Coal Mining Co.*,  
 5 Or. 509.

**Payment (continued).**

When no time of payment is stated in the note, it is payable at once: *Dodd v. Denny*, 6 Or. 156.

The presumption that a person not in possession of note has no authority to receive payments may be rebutted: *Swegle v. Wells*, 7 Or. 222.

Application of payments; if the parties fail to make, when and how done by the court: *Trullinger v. Kofoed*, 7 Or. 228; *Calhoun v. Galliland*, 2 W. T. 174.

Payment need not be pleaded as a counterclaim, and may be proved under a general allegation of payment: *Hendrix v. Gore*, 8 Or. 406.

Where the court applied payments admitted, first on unsecured claim and then on secured claim, admitted by answer to be a lien; held, proper application of payments: *Jackson v. New Idrian C. M. Co.*, 10 Or. 157.

Mortgagee foreclosing lien to secure several debts due him may, if proceeds are insufficient to pay all, pay any one of the debts, and a surety on others cannot compel *pro rata* application: *Wilson v. Allen and Lewis*, 11 Or. 154.

Action for money had and received lies by debtor against creditor to recover money paid to the latter to be applied on particular obligation, and not so applied: *Stewart v. Phy*, 11 Or. 335.

A promise to repay need not be alleged in such case: *Id.*

Demand is not necessary before action for reasonable value of services rendered: *Gibbs v. Davis*, 11 Or. 288.

Court cannot, on distribution of assets of an estate, order a share of a devisee to be paid to an assignee thereof: *Harrington v. La Rocque*, 13 Or. 344.

But such assignee may notify the executor of his claim for the purpose of requiring payment to him: *Id.*

Money collected from the principal debtor upon execution is *pro tanto* a discharge of a contract of guaranty of the debt: *Marx v. Swartz*, 14 Or. 177.

Evidence reviewed, and held to establish a defense of part payment: *Hughes v. Walker*, 14 Or. 481.

Voluntary payment of the debt of another gives rise to no cause of action in favor of the person so paying: *Williams & Co. v. Miller & Co.*, 1 W. T. 88.

**Penalties.** See Damages; Fines and Forfeitures.

**Penitentiary.** See Board of Commissioners for Erection of Penitentiary.

**Performance of Contracts.** See Contracts; Specific Performance.

**Perjury.**

Sufficient in indictment to allege the oath was taken in trial before Circuit Court, without designating the officer who administered it: *State v. Spencer*, 6 Or. 152.

Must set forth the matters in respect of which the crime was committed: *State v. Witham*, 6 Or. 366.

Slight variance in the proof of the statement sworn to from that alleged in the indictment is material: *State v. Ah Sam*, 7 Or. 477.

When an indictment charged that the defendant swore that he saw A at the house of B, on a certain day named, and it is shown that A was not there on that day, and testimony to the effect that the defendant did not so swear, but swore that A was at that house on another day, being produced, it is error to instruct that the variance was not material: *Id.*

**Perpetuation of Evidence.** See Evidence.

**Personal Property.** See Chattel Mortgages; Replevin; Sales; Taxation.

**Physicians and Surgeons.** See Contracts.

Responsible for ordinary skill; not liable for error of judgment: *Heath v. Glisan*, 3 Or. 64; *Boydston v. Giltner*, 3 Or. 118; *Williams v. Poppleton*, 3 Or. 139.

Refraction of arm by surgeon; question of negligence, and when liable for: *Boydston v. Giltner*, 3 Or. 118.

Experts may testify to skill used in a certain operation, but not to the skill of defendant generally: *Id.*; *Williams v. Poppleton*, 3 Or. 139.

Reputation for skill not admissible as evidence: *Williams v. Poppleton*, 3 Or. 139.

Consultations as part of *res gestæ* admissible, but not otherwise: *Id.*

Question which surgical system is best, or other questions of surgical science, not to be considered: *Id.*

Sufficient if practitioner follow a known system: *Id.*

The statute prescribing qualifications of a person practicing medicine is in no sense an *ex post facto* law: *Fox v. Territory*, 2 W. T. 297.

**Physicians and Surgeons** (continued).

Nor does such act prescribing who may practice medicine violate the fourteenth amendment of the United States constitution, either in depriving any person of his rights, or in making an unjust discrimination against him: *Id.*

**Pilot Commissioners.** See Pilots and Pilotage.

**Pilots and Pilotage.**

In suit between third persons, validity of warrant to act as pilot cannot be questioned: *Edwards v. Steamship Panama*, 1 Or. 418.

Possession and exhibition of warrant, sufficient to authorize master to employ: *Id.*

Territory of Washington has power to pass pilotage laws: *Id.*

Review of laws of United States in reference to pilotage: *Id.*

As to certain steam vessels the act of Congress of 1852 supersedes all state laws: *Id.*

Formal notice of charges need not be served on a pilot by the board of commissioners; it is sufficient if he be given an opportunity to explain and disprove: *Snow v. Reed*, 14 Or. 342.

Board cannot delegate to another the duty of deciding upon such charges, but they may employ an attorney to advise them: *Id.*

The word "states," in the act of Congress of 1837, regarding pilotage on navigable rivers between states, includes territories: *Neil v. Wilson*, 14 Or. 410.

In Oregon, pilot who has brought a vessel into the Columbia River cannot enforce a claim for outward pilotage fees also, as provided by Oregon statute, if the vessel chooses to take a Washington Territory pilot out: *Id.*

**Pleadings.** See Abatement; Accounts; Accounting; Actions and Suits; Administration; Administrators and Executors; Admiralty; Answers and Defenses; Appeal and Error; Assumpsit; Bill of Particulars; Bills and Notes; Bonds and Undertakings; Cloud on Title; Codes; Complaints; Contracts; Criminal Law; Damages; Divorce; Ejectment; Equity; Estoppel; Evidence; Forcible Entry and Detainer; Fraud and Deceit; Fraudulent Conveyance; Habeas Corpus; Injunctions; Interpleader;



**Pleadings (continued).**

Jurisdiction; Justice of the Peace; Malicious Prosecution; Mistake and Accident; Municipal Corporations; Negligence; Nuisance; Parties; Partition; Paupers; Practice; Quieting Title; Reformation; Seduction; Set-off and Counterclaims; Slander and Libel; Specific Performance; Usury.

1. CERTAINTY AND DEFINITENESS.
2. VERIFICATION.
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10. SUPPLEMENTAL PLEADINGS.
1. CERTAINTY AND DEFINITENESS.

Complaint alleging mere conclusions of law will not sustain judgment in default: *Williams v. Knighton*, 1 Or. 234.

Pleadings in County Court, under the act of 1859, were not required to be in any particular form: *Cain v. Harden*, 1 Or. 360.

The facts should be stated positively, and in a traversable form: *Heatherly v. Hadley*, 2 Or. 269.

Account being insufficiently pleaded, defendant should not demand bill of items, but should move that same be made more definite and certain: *Flanders v. Ish*, 2 Or. 320.

Though complaint does not state cause of action, court may have jurisdiction: *Norman v. Zieber*, 3 Or. 197.

Mere vagueness must be corrected by amendment, not visited by judgment: *Foren v. Dealey*, 4 Or. 92; *Houghton and Palmer v. Beck*, 9 Or. 325.

Concise statement of facts, constituting action or defense, should be pleaded, and not the circumstances from which such facts can be inferred: *Smith v. Foster*, 5 Or. 44.

Strict formality in pleading in Justice's Court not necessary: *Houghton and Palmer v. Beck*, 9 Or. 325.

Informal statement of fact is cured by verdict: *Id.*; *David v. Waters*, 11 Or. 448; *Aiken v. Coolidge*, 12 Or. 244; *Andros v. Childers*, 14 Or. 447.

**Pleadings (continued).**

But verdict does not supply a fact not pleaded: *Weiner v. Lee Shing*, 12 Or. 276.

In pleading city ordinance (prior to 1885), mere reference to it by number is insufficient; it must be set forth *in extenso* so far as relied on: *Pomeroy v. Lappeus*, 9 Or. 363; *Nodine v. Union*, 13 Or. 587.

Facts should not be stated in the alternative: *Ladd and Bush v. Ramsby*, 10 Or. 207.

Uncertainty, after judgment and on appeal, no ground for reversal, where there is no fatal defect: *Osborn v. Graves*, 11 Or. 526; *Baldock v. Johnson*, 14 Or. 542.

Where facts sufficient are alleged, although encumbered with redundant matter, the complaint will be sustained, no motion to strike out having been made: *Smith v. Butler*, 11 Or. 46.

In pleading the performance of a condition precedent under the Code, it is sufficient to allege generally that the party performed all the conditions on his part: *Griffin v. Pitman*, 8 Or. 342; *Fisk v. Henarie*, 13 Or. 156.

After verdict the only question is, whether the facts stated are sufficient to sustain the verdict: *Fisk v. Henarie*, 13 Or. 156.

A defective statement of facts in a pleading is waived by joining issue upon them: *Davis v. Wait*, 12 Or. 425.

Description and valuation of mare and her colt together, in complaint in replevin, is sufficient: *Prescott v. Heilner*, 13 Or. 200.

Essential facts must be alleged: *Tolmie v. Dean*, 1 W. T. 46.

Answer must state the facts with the certainty and definiteness of a complaint: *Meeker v. Wren*, 1 W. T. 73; *Røeder, Peabody, & Co. v. Brown*, 1 W. T. 112.

Pleadings under the Code are not subject to the rules of the old system of pleading: *Newberg and Abrams v. Farmer*, 1 W. T. 182; *P. S. I. Co. v. Worthington*, 2 W. T. 472.

The logic of pleadings stated, and the rigid rules of the common law contrasted with the rules of the Code: *Renton v. St. Louis*, 1 W. T. 215.

Common-law forms, while not demurrable, are too indefinite and uncertain for pleadings under the Code: *Id.*

**Pleadings (continued).**

Plaintiff must state his cause of action with sufficient particularity to inform the defendant of its real character: *P. S. I. Co. v. Worthington*, 2 W. T. 472.

The defendant must deny the plaintiff's allegations, or he must state new matters in avoidance, by way of counterclaim: *Id.*

If the pleadings are not full and definite, the remedy is by motion to cure the defect: *Id.*

**2. VERIFICATION.**

By person having knowledge of the facts must show that he has knowledge of all the facts alleged: *Willamette Falls etc. Co. v. Riley*, 1 Or. 183.

Where affidavit omitted venue, but the officer making it resided and had authority within the district of the court, it was held sufficient: *Dennison v. Story*, 1 Or. 272.

Verification by agent need not state the party is out of the county, if all the material allegations are known to the agent: *Steamer Senorita v. Simonds*, 1 Or. 274.

Allowance of amendment to is discretionary: *Blanchard v. Bennett*, 1 Or. 328.

Jurisdiction and authority of person administering oath must appear in his certificate: *Id.*

Want of proper verification or subscription is an irregularity waived in pleading over: *State v. Chadwick and Brown*, 10 Or. 423.

And the objection to the form of verification of an itemized account, furnished on demand, must be promptly taken, or it is waived: *Robbins v. Benson*, 11 Or. 514.

**3. CONSTRUCTION.**

Failure to deny fact, and conclusion therefrom, admits fact, but not conclusion: *Boydston v. Gilmer*, 3 Or. 118.

Opinion of experts admissible to explain technical words in, but not the construction of, the pleading: *Williams v. Poppleton*, 3 Or. 139.

It does not raise an issue to deny that plaintiff is a "duly organized corporation": *Oregon Central R. R. Co. v. Scoggin*, 3 Or. 161.

Navigability of stream alleged between certain points, not extended by construction beyond those points: *Felger v. Robinson*, 3 Or. 455.

**Pleadings (continued).**

Where answer attempts to allege manner of service of summons, evidence cannot aid the allegation: *Heathery v. Hadley and Owen*, 4 Or. 1.

In order to determine the issues to be tried in an action, the court can look to the pleadings only, which cannot be enlarged or explained by affidavits: *Cauthorn v. King*, 8 Or. 138.

Allegation that an order was made appointing an administrator on a certain day cannot be held to mean that letters appointing him issued at that time: *Wells v. Applegate*, 10 Or. 519.

Such construction should be favored as will lead parties to make early objections to defective pleadings: *Renton v. St. Louis*, 1 W. T. 215.

**4. ADMISSIONS.**

Party who would otherwise be estopped may take advantage of fact admitted by adversary's pleadings: *Lee v. Summers*, 2 Or. 260.

Failure to deny fact and conclusion therefrom admits the fact, but not the conclusion: *Boydston v. Giltner*, 3 Or. 118.

Character of wound, being alleged in answer, where the reply does not deny the same, the admission is conclusive: *Williams v. Poppleton*, 3 Or. 139.

Where the pleadings admit an agreed price for labor, evidence of reasonable value not admissible: *Davis v. Mason*, 3 Or. 154.

*Guardian ad litem* may bind infant by admissions in pleadings: *English v. Savage*, 5 Or. 518.

If plaintiff relies on the admissions in the answer to recover, he should not deny such admissions in his reply: *Spores v. Boggs*, 6 Or. 122.

Where the answer admits an allegation of the complaint, plaintiff is precluded from proving a state of facts other than alleged: *De Lashmutt v. Everson*, 7 Or. 212.

Answer admitting an essential fact omitted from complaint aids the latter, and it is good after verdict: *Turner v. Corbett*, 9 Or. 79.

Decree founded on claim to the extent admitted in the answer is good: *Jackson v. New Idrian C. M. Co.*, 10 Or. 157.



**Pleadings (continued).**

An answer admitting the facts alleged in the complaint, which entitle the plaintiff to damages, but denying the damages, at least nominal damages follow: *Hadlan v. Ott*, 2 W. T. 165.

**5. JOINDER OF CAUSES.**

Claims for wages earned under a contract before discharge from the employment, and after discharge, may be united: *Bowman v. Holladay*, 3 Or. 182.

"Multifariousness," assigned as an objection in a demurrer, though a term not known to the Code, may be construed as misjoinder of causes of action: *Cohen v. Ottenheimer*, 13 Or. 220.

Demurrer for misjoinder being sustained, an entirely new pleading must be filed, containing the cause which the pleader elects to pursue: *Id.*

Where plaintiffs jointly sue, relying on allegations of misrepresentation, which do not appear to have been made to them as a class, demurrer for misjoinder lies: *Powell v. Dayton etc. R. R. Co.*, 13 Or. 446.

Court unable to agree whether a count for destruction of a building may be joined with counts upon contract: *Williams v. Miller & Co.*, 1 W. T. 88.

**6. MOTION TO STRIKE OUT.**

Matter in abatement stricken out, when defendant refused to elect between abatement and bar pleaded in same answer: *Or. Central R. R. Co. v. Wait*, 3 Or. 91.

If part of matter moved to be stricken out is properly pleaded, motion denied: *White v. Allen*, 3 Or. 103; *Holbrook v. Page*, 3 Or. 374.

When matter in abatement and bar is pleaded in same answer, abatement stricken out on motion: *Or. Central R. R. Co. v. Scoggin*, 3 Or. 161.

Redundant matter in an action for recovery of real property: *Pease v. Hannah*, 3 Or. 301.

Demurrer, and not motion to strike out, is the remedy against deficient pleading filed in good faith: *Cline v. Cline*, 3 Or. 355.

Test of materiality: Will failure to prove the allegation decide the case, in whole or in part? *Id.*

Averments not presenting issuable facts will be stricken out on motion: *Holbrook v. Page*, 3 Or. 374.

**Pleadings (continued).**

Express admissions in answer are unnecessary, and may be stricken out as redundant: *Id.*

Defense sufficient as pleaded may be stricken out if false, but cannot be demurred out: *Torrence v. Strong*, 4 Or. 39.

Answer must be false, and pleaded in bad faith, to justify striking out as sham: *Foren v. Dealey*, 4 Or. 92.

In absence of motion to strike out, mere surplusage will not render a complaint fatally defective: *Smith v. Butler*, 11 Or. 46.

Demurrer cannot be stricken out on motion: *Cohen v. Ottenheimer*, 13 Or. 220.

Error in striking out an answer is waived by filing a new answer: *Hexter v. Schneider*, 14 Or. 184.

Motion to strike out a motion will not be allowed: *Mann v. Young*, 1 W. T. 454.

Defendant, who has pleaded irrelevant matter in his answer cannot complain of refusal of court to strike out like matter from the reply: *P. S. I. Co. v. Worthington*, 2 W. T. 472.

**7. MISCELLANEOUS MOTIONS.**

Motion to make definite, and not demand for bill of items, is proper remedy, when insufficient statement of account is set out in complaint: *Flanders v. Ish*, 2 Or. 320.

Where abatement and bar were pleaded in same answer, motion to compel election sustained: *Or. Central R. R. Co. v. Wait*, 3 Or. 91.

Counter-affidavits may be filed on motion for leave to defend after judgment, under section 57 of Code: *Smith v. Smith*, 3 Or. 363.

Motion for judgment on the pleadings allowed, where answer denies legal conclusions only: *Simpson v. Prather*, 5 Or. 86.

Such motion, under the Oregon Code, should not be allowed, except where new matter in answer is not denied by reply: *Bowles v. Doble*, 11 Or. 474.

In absence of demurrer, defective pleading not constituting a defense should be taken advantage of, after verdict, by motion *non obstante*, and not by objection to proof at trial: *Specht v. Allen*, 12 Or. 117.

**Pleadings (continued).**

If complaint be faulty in other respects than those demurrable under the Code, the fault may be reached by motion: *Renton v. St. Louis*, 1 W. T. 215.

If the pleadings are not full and accurate, the remedy is by motion to cure the defect: *P. S. I. Co. v. Worthington*, 2 W. T. 472.

**8. AMENDMENTS.**

Allowance of amendment to verification is discretionary: *Blanchard v. Bennett*, 1 Or. 328.

Amendment on appeal from County Court under the statute does not include the right of filing a new pleading for first time after default: *Cain v. Harden*, 1 Or. 360.

Allowance of amendment after calling case for trial is discretionary: *Brauns v. Stearns*, 1 Or. 367.

Abatement and bar pleaded in same answer, leave to amend matter in abatement denied: *Or. Central R. R. Co. v. Scoggin*, 3 Or. 161.

Though complaint does not allege sufficient facts, court may have jurisdiction and allow amendment: *Norman v. Zieber*, 3 Or. 197.

Amendment of complaint allowed to add new defendants suggested by the answer: *McCown v. Hannah*, 3 Or. 302.

Leave to amend, by setting up facts known at time of filing pleading not granted without excuse shown: *Holladay v. Elliott*, 3 Or. 340.

Distinction between supplementary answer and such amendment: *Id.*

Plaintiff seeking to recover on contract different from that pleaded must get leave to amend: *Banks v. Crow*, 3 Or. 477.

Amendment discretionary in Circuit Court; not permitted in Supreme Court: *Bamford v. Bamford*, 4 Or. 30; *Henderson v. Morris*, 5 Or. 24.

Mere vagueness is to be corrected by amendment, not visited by judgment: *Foren v. Dealey*, 4 Or. 92; *Houghton and Palmer v. Beck*, 9 Or. 325.

On appeal from justice to Circuit Court, amendments changing the issues not allowed: *Moser v. Jenkins*, 5 Or. 447.

**Pleadings (continued).**

Otherwise where the amendment does not change the issue: *Kirk v. Matlock*, 12 Or. 319; *Newberg and Abrams v. Farmer*, 1 W. T. 182.

Amendment not changing issues tried in County Court may be allowed on appeal: *Monroe v. N. P. Coal Mining Co.*, 5 Or. 509.

Amendment by filing written reply not changing the issues tried in Justice's Court, allowed on appeal: *Rohr v. Isaacs*, 8 Or. 451.

Character of amendments cannot be prescribed by the Supreme Court in remanding a cause to the Circuit Court: *Branson v. Oregonian R'y Co.*, 11 Or. 161.

Discretion of Circuit Court as to character of amendment is not affected by the fact of a former appeal: *Id.*

Error in refusing to allow amendment by filing an answer offered is waived by filing another omitting the objectionable feature: *Bowles v. Doble*, 11 Or. 474.

Discretion of Circuit Court over amendments, reviewable only in case of abuse: *Id.*; *Hexter v. Schneider*, 14 Or. 184.

An amended answer, same as former answer but omitting matters demurred to, is a new answer: *Wells v. Applegate*, 12 Or. 208.

When amended answer is filed, the former one and all motions and demurrers relating thereto are withdrawn, and cease to be a part of the record: *Id.*

Complaint, indefinite as to whether in contract or tort, where the facts sustain an action on contract, may be so amended as to sustain an attachment already issued: *Suksdorff v. Bigham*, 13 Or. 369.

Amendment to complaint enlarging the demand, in the absence of fraud, and where no new cause of action is thereby added, does not invalidate an attachment in the action: *Id.*

Great liberality of amendment should be allowed under the Code: *Swift v. Mulkey*, 14 Or. 59; *Newberg and Abrams v. Farmer*, 1 W. T. 182.

Filing amended answer waives objection to a ruling of the court striking out former answer: *Hexter v. Schneider*, 14 Or. 184.

It seems, where a plaintiff fails to prove his case as to



**Pleadings (continued).**

some of several defendants in an action for tort, he can, on the trial, amend by omitting them: *Cooper v. Blair*, 14 Or. 255.

Copy of pleading amended need not be served, unless the court so orders: *Williams & Co. v. Miller & Co.*, 1 W. T. 88.

Where a party demurs, and the court orders amended pleading filed, such order in effect sustains the demurrer: *Id.*

If demurrer to defective complaint is overruled, and defendant answers over, the complaint will be deemed by the appellate court to have been amended in all respects in which it could have been amended: *Ward v. Moorey*, 1 W. T. 104.

Refusal of court to allow amendments on appeal from Justice's Court not changing the issues tried is error: *Newberg and Abrams v. Farmer*, 1 W. T. 182.

Such proposed amendment of a pleading must be made clearly to appear to the Supreme Court before it will review the action of the District Court refusing to allow the same: *Id.*

When demurrer has been sustained, amendment should be allowed if the pleading be amendable, especially where honest endeavor may be secured by imposition of terms: *Renton v. St. Louis*, 1 W. T. 215.

Filing amended complaint, after saving exception to the sustaining of the demurrer to the complaint, does not waive the objection: *Wood v. Mastick*, 2 W. T. 64.

**9. DEMURRER.**

Multifariousness was subject to demurrer before the Code: *White v. Delschneider*, 1 Or. 254.

Lies in equity for misjoinder of parties defendant: *Id.*

Error in sustaining or overruling demurrer is waived by pleading over: *Huffman v. McDaniel*, 1 Or. 259; *Richards v. Fanning*, 5 Or. 356; *Wells v. Applegate*, 12 Or. 208; *Ward v. Moorey*, 1 W. T. 104.

Demurrer to whole complaint will be overruled if one cause of action therein be well pleaded: *Ketchum v. State*, 2 Or. 103; *Toby v. Ferguson*, 3 Or. 27; *Simpson v. Prather*, 5 Or. 86; *Lafleur and Isaacs v. Douglass*, 1 W. T. 185.

**Pleadings (continued).**

Demurrer, and not motion to strike out, the remedy against insufficient statement of facts: *Cline v. Cline*, 3 Or. 355.

Failure to demur does not waive objection that complaint does not state cause of action: *Brown v. Emmerson*, 3 Or. 452; *King and Lownsdale v. Boyd*, 4 Or. 326; *Evarts v. Steger*, 5 Or. 147; *Mack v. Salem*, 6 Or. 275; *Olds v. Cary*, 13 Or. 362.

Defense sufficient as pleaded, though false, cannot be reached by demurrer: *Torrence v. Strong*, 4 Or. 39.

Objection that court has no jurisdiction is not waived by failure to demur: *King and Lownsdale v. Boyd*, 4 Or. 326.

Overruling of demurrer, when waived by answering over, cannot be assigned as error: *Richards v. Fanning*, 5 Or. 356; *Olds v. Cary*, 13 Or. 362.

Failure to demur waives irregularity not jurisdictional in pleading counterclaim: *Scheland v. Erpelding*, 6 Or. 258.

Demurrer on the ground that the cause is barred by a statute of limitations, lies only when the pleading shows the fact on its face: *Weiss v. Bethel*, 8 Or. 522; *Wilt v. Buchtel*, 2 W. T. 417.

Pleading to the merits, in equity, without objecting by demurrer or answer that plaintiff has a remedy at law, waives such objection: *Kitcherside v. Myers*, 10 Or. 21.

Defective description of land by natural objects, not ambiguous on the face of the complaint, cannot be reached by demurrer: *Ladd and Tilton v. Mason*, 10 Or. 308.

When upon the face of the complaint it appears that other parties are necessary, demurrer for defect of parties is proper; if too many parties, demurrer as not stating facts sufficient: *Cohen v. Ottenheimer*, 13 Or. 220.

"Multifariousness" is term unknown to the Code; in demurrer may be held to mean misjoinder of several causes of action: *Id.*

Demurrer cannot be stricken out on motion: *Id.*

Demurrer for misjoinder of causes of action being sustained, a new pleading must be filed: *Id.*

Demurrer is not an absolute admission of the facts, but raises an issue of law upon the facts pleaded: *Rice v. Rice*, 13 Or. 337.

Demurrer to a complaint in a divorce suit is not such ad-

**Pleadings (continued).**

mission of the charge as is meant by section 494 of the Civil Code (sec. 498, Hill's A. L.): *Id.*

Demurrer to complaint in action on an injunction bond, which fails to allege that the injunction was wrongful, or without sufficient cause, should be sustained, but answering over waives the defect: *Olds v. Cary*, 13 Or. 362.

That statute of limitations has run, unless full time has expired, is no ground for demurrer, though the suit be in equity: *Id.*

Misjoinder of causes of action, where the plaintiffs rely on allegations of fraudulent misrepresentations which do not appear to have been made to them as a class, is ground for demurrer: *Id.*

If party demurs, and court orders amendment, such order is in effect a sustaining of the demurrer: *Williams & Co. v. Miller & Co.*, 1 W. T. 88.

Demurrer under Code is neither the general nor special demurrer at common law; it is a new creation, with no applicability except in the instances expressed in the statute: *Renton v. St. Louis*, 1 W. T. 215.

Demurrer to a common-law form of pleading is rarely applicable under the Code, though such pleading is generally obnoxious to motions: *Id.*

Right of demurrer is lost by answering, and objections must be taken by some other method: *Id.*

Demurrer must distinctly specify the grounds: *Id.*

Where demurrer to complaint is sustained and exception saved, the objection is not waived by going to trial on an amended complaint: *Wood v. Mastick*, 2 W. T. 64.

**10. SUPPLEMENTAL PLEADINGS.**

Supplemental answer in the nature of a plea *puis darrein continuance* is not a waiver of former pleas, unless inconsistent: *Hamlin v. Kinney*, 2 Or. 91.

Material facts not existing at commencement of suit may be set up by supplemental answer: *White v. Allen*, 3 Or. 183.

Such answer, and an amendment setting up facts known at time of filing original, distinguished: *Holladay v. Elliott*, 3 Or. 340.

Attaching creditor, who has obtained temporary restrain-

**Pleadings** (continued).

ing order against foreclosure of fraudulent chattel mortgage, should, on obtaining judgment on his claim, be allowed to file supplemental bill in the injunction suit showing the rendition of such judgment: *Meacham Arms Co. v. Swarts*, 2 W. T. 412.

**Pledges.** See Bailments.

**Police Judge.**

Police judge may be given powers of justice of the peace within the city, but his jurisdiction cannot be limited to criminal cases: *State v. Wiley*, 4 Or. 184.

His jurisdiction is identical with justice in civil as well as in criminal cases: *Id.*; *Portland v. Denny*, 5 Or. 160.

Has jurisdiction of all crimes defined by any ordinance of the city: *Portland v. Denny*, 5 Or. 160.

Is entitled to his salary as compensation in city cases, and the fees earned as justice besides: *Id.*

Legislature has power to fix compensation; construction of charter as to fees in state cases: *Adams v. Multnomah Co.*, 6 Or. 116.

**Policemen.** See Offices and Officers.

**Possession.** See Adverse Possession; Forceful Entry and Detainer; Liens; Notice; Mortgages; Public Lands.

Possessory rights of settlers on public lands may be protected from invasion against one having no better title: *Woodside v. Rickey*, 1 Or. 108; *Lee v. Simonds*, 1 Or. 158; *Colwell v. Smith*, 1 W. T. 92; *Ward v. Moorey*, 1 W. T. 104.

In action for recovery of real property, every presumption is in favor of the possessor: *McEwen v. Portland*, 1 Or. 300.

Possession is notice of equitable rights in the property sufficient to put purchaser on inquiry: *Stannis v. Nicholson*, 2 Or. 333; *Bohlman v. Coffin and Carter* 4 Or. 313; *Skellinger v. Smith*, 1 W. T. 369.

Of note by maker is presumption of payment: *Hedges v. Strong*, 3 Or. 18.

Quiet and exclusive possession is evidence of title until a better is claimed and shown by another: *Or. Cas. R. R. Co. v. Or. Steam Nav. Co.*, 3 Or. 178.

Mortgagee in possession has the right to foreclose and to remain in possession until paid, though an action to



**Possession (continued).**

recover the debt is barred by the statute of limitations: *Anderson v. Baxter*, 4 Or. 105; *Roberts v. Sutherlin*, 4 Or. 219.

Possession of plaintiff, to entitle him to maintain suit to quiet title under section 500 of the Code (sec. 504, Hill's A. L.), must be lawful: *Tichenor v. Knapp*, 6 Or. 205.

Possession, relied on as part performance where contract to convey land was not in writing, must be visible and exclusive, and taken under contract: *Brown v. Lord*, 7 Or. 302.

Mortgagee in possession is estopped to deny the legality of his possession when sued for rents and profits: *Renshaw v. Taylor*, 7 Or. 315.

Possession gained without consent after a parol promise to lease for years gives possessor no rights: *Pulse v. Hamer*, 8 Or. 251.

Possession under color of title is presumed to be co-extensive with the boundaries in the deed: *Phillippi v. Thompson*, 8 Or. 428; *Joy v. Stump*, 14 Or. 361.

Constructive possession of wild lands sufficient under section 500 of the Code (sec. 504, Hill's A. L.), to quiet title: *Thompson v. Woolf*, 8 Or. 454.

Possession is sufficient evidence of title to sustain conversion against a wrong-doer: *Krewson & Co. v. Purdom*, 13 Or. 563.

But *semble*, that possession alone is not sufficient to authorize recovery of value, unless accompanied by claim of right: *Id.*

Where a father purchases land in the name of his infant son, and goes into possession and improves, his possession is his son's possession: *Lawrence v. Lawrence*, 14 Or. 77.

Possession under unacknowledged deed is a species of actual notice: *Manaudas v. Mann*, 14 Or. 450.

Possession of public lands by settler will be protected by the courts from time of entry: *Colwell v. Smith*, 1 W. T. 92; *Ward v. Moorey*, 1 W. T. 104.

Possession as tenant or intruder presents no impediment to transfer of title: *Bullene v. Garrison*, 1 W. T. 587.

**Practice.** See Abatement; Actions and Suits; Administration; Admiralty; Affidavits; Answers and Defenses; Appeal and Error; Attachments; Attorneys; Bills and Notes; Complaints; Contracts; Corporations; Costs and Disbursements; Criminal Law; Damages; Depositions; Divorce; Dower; Elections; Eminent Domain; Equity; Evidence; Executions, and Proceedings Supplemental; Fees; Filing Papers; Garnishment; Habeas Corpus; Injunctions; Interpleader; Judgment Roll; Jury and Jury Trial; Justice of the Peace; Law of the Case; Liens; Lost Papers; Mandamus; Mortgages; New Trial; Nonsuit; Nuisance; Parties; Payment; Pleadings; Quo Warranto; Reference; Replevin; Review, Writ of; Rules of Court; Seals; Summons; Tender; Usury; Variance; Venue; Witnesses.

1. APPEARANCE.

2. CONTINUANCE.

3. CONTROL OF THE COURT OVER PLEADINGS.

4. STIPULATIONS.

5. STAY OF PROCEEDINGS.

6. PAYMENT INTO COURT.

7. TRIAL AND INCIDENTS.

8. TRIAL BY THE COURT.

9. ORDERS.

10. MISCELLANEOUS.

1. APPEARANCE.

Of defendant for any purpose is equivalent to service of summons: *Rogue River Mining Co. v. Walker*, 1 Or. 341.

Voluntary, does not waive time to plead, but informality of process and service only: *Harker v. Fahie*, 2 Or. 89.

Defendant appearing by counsel, and filing answer, cannot claim want of means to employ counsel, as excuse for laches, when applying to court for leave to amend the answer by setting up facts known at the time of filing the original answer: *Holladay v. Elliott*, 3 Or. 340.

Docket entry, reciting appearance, evidence will not be heard in collateral action to show the appearance was special; withdrawal of appearance cannot oust jurisdiction: *White v. Thompson*, 3 Or. 115.

**Practice (continued).**

- Voluntary, is a waiver of service of summons and complaint: *White v. Northwest Stage Co.*, 5 Or. 99.
- Parties cannot waive service of notice of appeal by voluntary appearance: *Oliver v. Harvey*, 5 Or. 360; *Wolf v. Smith*, 6 Or. 73.
- Respondent in an equity suit failing to appear in the Supreme Court is deemed to have abandoned the appeal, and appellant is entitled to a reversal on making a *prima facie* case: *Donegan v. Murphy*, 6 Or. 436.
- The appearing and answering by a guardian for his ward waives irregularities of service: *Ankeny v. Blackiston*, 7 Or. 407.
- Recital of appearance in record cannot be contradicted by affidavits on appeal: *Cauthorn v. King*, 8 Or. 138.
- Circuit Court has jurisdiction, on appeal from justice, of both defendants, where both appear and defend, though judgment below was against one, and he alone appealed: *Id.*
- Appearance by garnishee in person and by attorney at the hearing, cures a defective service upon the garnishee: *Carter, Rice, & Co. v. Koshland*, 12 Or. 492.
- Notice of appearance under section 520, Civil Code, is unnecessary, unless the right of attorney to appear is challenged by the opposite party: *Id.*
- Appearance and filing demurrer waives defects of service of process: *Williams & Co. v. Miller & Co.*, 1 W. T. 88.
- Statute does not permit defendant to move for dissolution of attachment until he has appeared and answered: *Rodolph v. Mayer*, 1 W. T. 133.
- Jurisdiction of the court over the person of a defendant cannot be questioned after appearance and answer to the merits: *Meigs v. Keach*, 1 W. T. 305.
- Defective service of notice is waived by appearance in the Supreme Court on error: *Schwabacher v. Wells*, 1 W. T. 506.
- Held, that the defendant, by waiving service of motion to perfect transcript, without protestation, has entered general appearance: *Yesler v. Oglesbee*, 1 W. T. 604.
- Defendants sued under a firm name waive the defect by appearing and pleading: *Baxter & Co. v. Scoland and Jensen*, 2 W. T. 86.

**Practice (continued).**

Filing demurrer constitutes appearance by the defendant, and judgment in default cannot be rendered thereafter: *W. W. P. & P. Co. v. Budd*, 2 W. T. 336.

Whether District Court can by its rules make service on the opposite party of a demurrer filed with the clerk, essential to an appearance, in view of section 72 of the Code of 1881, doubted: *Id.*

**2. CONTINUANCE.**

Where it was not shown that there was reasonable expectation of procuring the evidence at the next term, continuance denied: *State v. Leonard*, 3 Or. 157.

Witness having no fixed residence, clear showing of probability of obtaining his testimony must be shown: *Id.*

Plaintiff in notice of contest of election cannot on motion obtain hearing at earlier day: *Myers v. Warner*, 3 Or. 212.

Issues with some of defendants not being made up, motion by plaintiff for continuance premature: *McCown v. Hannah*, 3 Or. 302.

On death of party, his representatives cannot appeal until they obtain an order allowing continuance in their names: *Dick v. Kendall*, 6 Or. 166.

Application for such order made within one year is in time, although the order allowing the continuance of the suit by them is not made until after the expiration of a year: *Id.*

Suit is suspended during the time from the death to the allowance of the order, and such time is not any part of the period allowed for appeal: *Id.*

After trial commences, it is within the discretion of the court to adjourn to future time to enable a party to obtain certain written evidence: *Young v. Patton*, 9 Or. 195.

Continuance cannot be claimed as a right in a divorce suit by party negligently allowing her time to take testimony to expire: *Savage v. Savage*, 10 Or. 331.

Granting or refusing continuance is discretionary, and not reviewable on appeal: *State v. O'Neil*, 13 Or. 183; *Thompson v. Territory*, 1 W. T. 547.

Affidavit for, must state the facts upon which belief that witness can be had is founded: *Id.*



**Practice (continued).**

Due diligence must be shown in procuring testimony, to entitle party to a continuance: *Roeder, Peabody, & Co. v. Brown*, 1 W. T. 112.

Same showing must be made in criminal as in other cases: *Thompson v. Territory*, 1 W. T. 547.

Defendant is not entitled to a continuance as a matter of right under section 7 of the Criminal Practice Act: *Id.*

**4. STIPULATIONS.**

Stipulation is construed, and intention ascertained from the language used: *GrosLouis v. Northcut*, 3 Or. 394.

Stipulation that party was divorced in a certain suit is an admission of jurisdiction of the court to grant the divorce: *Id.*

Parties cannot stipulate to waive notice of appeal, and give the court jurisdiction: *Oliver v. Harvey*, 5 Or. 360.

Stipulation as to submission of cause to court without jury for trial during vacation construed: *Arrigoni v. Johnson*, 6 Or. 167.

When the facts are stipulated in a trial by the court without jury, no findings of fact are necessary: *Frush v. East Portland*, 6 Or. 281.

Testimony may be taken by referee appointed by the court at request of parties, and the cause tried in vacation if so stipulated: *Roy v. Horsley*, 6 Or. 382.

Stipulation for a decree, entered into by some of the parties, affecting the final disposition of property rights of all the parties to a suit, cannot be enforced: *Adams v. Wilson*, 6 Or. 391.

**3. CONTROL OF THE COURT OVER PLEADINGS.**

On appeal from default in County Court, defendant cannot put in answer: *Cain v. Harden*, 1 Or. 360.

Abatement should be pleaded in separate answer, and disposed of before answer to merits: *Hopwood v. Patterson*, 2 Or. 49.

No amendments which change the issues tried in Justice's Court are allowed in Circuit Court: *Moser v. Jenkins*, 5 Or. 447; *Newberg and Abrams v. Farmer*, 1 W. T. 182.

But amendment not changing the issues may be allowed: *Kirk v. Matlock*, 12 Or. 319.

**Practice (continued).**

And an amendment not changing issues, tried in County Court may be allowed: *Monroe v. N. P. Coal Mining Co.*, 5 Or. 509.

Reply may be filed to counterclaim in answer in Circuit Court, though in Justice's Court it was made orally, and not entered in the docket: *Rohr v. Isaacs*, 8 Or. 451.

Supreme Court may remand a case, with leave to amend pleadings in court below: *Branson v. Or. R'y Co.*, 10 Or. 278.

The power of the Circuit Court, in regard to the nature and extent of the amendments, is not affected by the facts that the case was so remanded, and Supreme Court has no power to prescribe their character: *Branson v. Or. R'y Co.*, 11 Or. 161.

Court cannot make a suit in equity out of facts alleged, as in an action at law: *Knowles v. Herbert*, 11 Or. 54; *S. C.*, 11 Or. 240; *Beacannon v. Liebe*, 11 Or. 443.

Judgment on the pleadings, except upon failure to reply, condemned as bad practice: *Bowles v. Doble*, 11 Or. 474.

Court has no right, after erroneously entering default, and refusing to set same aside on showing made, to give effect to a stipulation allowing defendant to plead upon waiving defense of statute of limitations: *Mitchell v. Campbell*, 14 Or. 454.

When the court directs amendment of a pleading, copy need not be served unless so ordered: *Williams & Co. v. Miller & Co.*, 1 W. T. 88.

*Quære*, whether by stipulation, without order of court, time for filing transcript on appeal can be enlarged: *Peterson v. Foss*, 12 Or. 81.

Stipulation to waive defense of statute of limitations, upon leave to plead, after default has been erroneously entered, and the court has declined to set the same aside, is forced from the defendant, and he is not bound by it: *Mitchell v. Campbell*, 14 Or. 454.

*Quære*, whether in any event such stipulation will stand, although made upon sufficient consideration: *Id.*

**5. STAY OF PROCEEDINGS.**

Doctrine of parol demurrer is not recognized in Oregon: *English v. Savage*, 5 Or. 518.

**Practice (continued).**

When an undertaking for stay of proceedings on appeal has been filed, the Circuit Court may order recall of execution issued: *Bentley v. Jones*, 8 Or. 47.

To prevent surprise or injustice, court on proper showing might stay the proceedings, where sheriff has made a false return, regular on its face, until the question of the return is settled: *Washington Mill Co. v. Kinnear*, 1 W. T. 99.

**6. PAYMENT INTO COURT.**

Money paid into court under protest, in action to condemn land, was upon motion ordered paid to the parties entitled to it: *Holladay v. Elliott*, 3 Or. 341.

Tender and payment into court in such case is an admission of damages to the amount tendered, and the money paid in belongs to the defendant: *Oregon R'y & Nav. Co. v. Oregon Real Estate Co.*, 10 Or. 444.

But does not preclude defendant from defending against the recovery of any greater sum: *Simpson v. Carson*, 11 Or. 361.

**7. TRIAL AND INCIDENTS.**

Charge of fraud in procuring judgment by confession should not be finally determined on motion and affidavits: *Miller v. Oregon City Mfg. Co.*, 3 Or. 24.

In action to condemn land, the issues of value, and whether the land is subject to appropriation, may be tried together by consent: *Oregon and Cascade R. R. Co. v. Baily*, 3 Or. 164.

Under the statute, they are distinct defenses, and must be made in separate trials: *Oregon Central R. R. Co. v. Wait*, 3 Or. 428.

Under certain pleadings in an action to condemn lands, defendant allowed to open and close: *Oregon and California R. R. Co. v. Barlow*, 3 Or. 311.

The trial includes the rendition and receiving of the verdict: *State v. Spores*, 4 Or. 198.

No proof of damages is necessary, where judgment is rendered for want of answer: *White v. Northwest Stage Co.*, 5 Or. 99. But see *Hadlan v. Ott*, 2 W. T. 165.

How exceptions must be taken: *Richards v. Fanning*, 5 Or. 356; *Murray v. Murray*, 6 Or. 17; *Kearney v. Snodgrass*, 12 Or. 311.

**Practice (continued).**

Error to exclude testimony of witness present during the examination of other witnesses, against the order of the court, but he may be punished for contempt: *Hubbard v. Hubbard*, 7 Or. 42.

Court has discretion to admit evidence on promise that the same will be subsequently connected, and made admissible: *Bennett v. Stephens*, 8 Or. 444.

Error to permit attorney, against objection, in his argument, to assume or state facts not proved: *Tenny v. Mulvaney*, 8 Or. 513.

Where the objection made to the introduction of evidence was specific, all other grounds are waived: *Ladd and Bush v. Sears*, 9 Or. 244.

Attorney, in opening case to jury, is not confined to general statement of the issues, but may detail the particular facts intended to be proved: *Long and Spaur v. Lander*, 10 Or. 175.

Use of diagram by witness, not introduced in evidence, but shown to be correct, permissible: *Sheppard v. Yocum and De Lashmutt*, 10 Or. 402.

Objection to proof of a defense, taken at trial, on the ground that the allegation is defective, held bad practice; demurrer or motion *non obstante* is the proper course: *Specht v. Allen*, 12 Or. 117.

Documentary evidence may be admitted provisionally, and instructions as to their effect afterward given: *Smith v. Shattuck*, 12 Or. 362.

No error for court to limit counsel to less than two hours in argument to jury: *Hurst v. Burnside*, 12 Or. 520.

Attention of court to tampering with witness must be called, to be available on appeal: *Tucker v. Flouring Mills Co.*, 13 Or. 28.

It is the duty of plaintiff to elect which defendants he will proceed against, where several are improperly joined: *Tyler v. T. of T. A. & P. U.*, 14 Or. 485.

Where the facts are admitted, entitling plaintiff to damages, merely nominal damages will be adjudged where he moves for judgment and does not ask for trial: *Hadlan v. Ott*, 2 W. T. 165.

Where answer admits part of the allegations of the complaint, the plaintiff is not relieved from proving the



**Practice (continued).**

other controverted allegations: *Breemer v. Burgess*, 2 W. T. 290.

Where part of the items of plaintiff's demand is admitted by the pleadings, he is entitled to recover interest on such items from the commencement of the action: *Id.*

If the court committed error in admitting evidence, the error is cured by withdrawing such evidence from the jury in the charge: *P. S. I. Co. v. Worthington*, 2 W. T. 472.

**8. TRIAL BY THE COURT.**

Findings must be sufficient to sustain the judgment, and must cover all the issues: *Fink v. Canyon Road Co.*, 5 Or. 301.

Party wishing to object to the sufficiency of the findings should apply to the Circuit Court for further and more specific findings, or procure them to be put in bill of exceptions: *Luse v. Isthmus Transit R'y Co.*, 6 Or. 125; *Eakin v. McCraith*, 2 W. T. 112.

Findings need only cover the material issues: *Philomath College v. Hartless*, 6 Or. 158.

Where the facts are stipulated, no findings of fact are necessary: *Frush v. East Portland*, 6 Or. 281.

Finding of fact is conclusive upon parties to the suit in favor of persons not parties: *Knott v. Knott*, 6 Or. 334.

Findings are as a verdict, and will be set aside in the same manner and for the same reasons: *Hallock v. Portland*, 8 Or. 29; *Phelps v. Steamship City of Panama*, 1 W. T. 518; *Tierney v. Tierney*, 1 W. T. 568; *Bullene v. Garrison*, 1 W. T. 587; *Baker and Hamilton v. McAllister*, 2 W. T. 48.

General finding that the complaint is true and answer untrue is sufficient: *McFadden v. Friendly*, 9 Or. 222.

Findings of fact and law are "separately stated" when severable and distinct: *Weissman v. Russell*, 10 Or. 73.

Where the findings cover the new matter in the answer, a reply, though absent from the record, is presumed to have been filed: *Id.*

Ambiguous finding is given a construction that accords with pleadings and supports judgment: *Whitlock v. Manciet and Bigne*, 10 Or. 166.

Findings of court below or referee in equity cases may be

**Practice (continued).**

reviewed on the evidence on appeal: *Howe v. Patterson*, 5 Or. 353; *O'Leary v. Fargher*, 11 Or. 225, overruling *Fahie v. Lindsay*, 8 Or. 474.

On waiver of jury trial, the provision of the Practice Act requiring court to state separately its findings of fact and law does not apply to divorce cases: *Madison v. Madison*, 1 W. T. 60.

Findings of fact by the judge answer to a special verdict, while the conclusions of law are in the nature of a general verdict: *Willey v. Morrow*, 1 W. T. 475.

Trial by court in a law case, there being no waiver of jury trial, is the exercise of a power not authorized by law: *Johnson v. Goodtime*, 1 W. T. 484.

In divorce cases, being a proceeding at law, the findings of the court are as the verdict of a jury, and not to be set aside unless manifestly contrary to the evidence: *Tierney v. Tierney*, 1 W. T. 568.

Supreme Court will not reverse a finding of fact if there be any evidence to support it, though said court would make a different finding if it were an open question: *Baker and Hamilton v. McAllister*, 2 W. T. 48.

Where the findings are not commensurate with the issues, the remedy is by application to the court for additional findings not appeal: *Eakin v. McCraith*, 2 W. T. 112.

The findings may be amended by the court at any time before judgment: *Calhoun v. Gilliland*, 2 W. T. 174.

**9. ORDERS.**

*Nunc pro tunc* order correcting record, when discretionary and when not: *Road Co. v. Douglas County*, 5 Or. 406.

A contract authorized by the County Court, though not in the form of an order, is properly entered in the journal: *Road Co. v. Douglas County*, 6 Or. 299.

Order dissolving or refusing to dissolve an attachment is a final order from which an appeal lies: *Sheppard v. Yocum*, 11 Or. 234; *Suffern v. Chisholm*, 1 W. T. 486.

When the rights of third parties have not intervened, a court may amend its records to make them conform to the truth: *Carter, Rice, & Co. v. Koshland*, 12 Or. 492.

Where a long time after final decree is entered it is corrected by a *nunc pro tunc* order, it seems right of appeal runs from the date of the latter order: *Lee v. Imbrie*, 13 Or. 510.

**Practice (continued).**

Judgments *nunc pro tunc* are only allowed in favor of justice, never to work injustice: *Hays v. Miller*, 1 W. T. 143.

Judge in vacation can make orders *nunc pro tunc* correcting record of prior term only upon express statutory authority, and statute must be strictly followed: *Hale v. Finch*, 1 W. T. 517.

Order, in awarding custody of and fixing allowance for support of children in divorce case, is interlocutory and not final: *Tierney v. Tierney*, 1 W. T. 568.

Party must take notice of all orders of the court, and pleadings filed pursuant thereto: *Williams & Co. v. Miller & Co.*, 1 W. T. 88.

**10. MISCELLANEOUS.**

Record must show affirmatively that defendant was served with amended complaint to sustain judgment thereon for want of answer: *Tolmie v. Otchin*, 1 Or. 95.

No evidence receivable in Supreme Court in admiralty cases: *Cutler v. Steamship Columbia*, 1 Or. 101; *Nickels v. Griffin*, 1 W. T. 374; *contra*, *Phelps v. S. S. City of Panama*, 1 W. T. 615.

On motion for leave to file answer in the Circuit Court after default below, affidavits cannot be heard: *Cain v. Harden*, 1 Or. 360.

Reasonable time will be allowed by Circuit Court to bring up proceedings by *certiorari*: *Thompson v. Multnomah County*, 2 Or. 34.

When the account sued on is insufficiently set forth, the defendant's remedy is by motion to make more definite: *Flanders v. Ish*, 2 Or. 320.

Where abatement and bar were pleaded in same answer, defendant was compelled to elect: *Oregon Central R. R. Co. v. Wait*, 3 Or. 91.

On motion for leave to answer after default, verified answer should be presented with the motion: *White v. Northwest Stage Co.*, 5 Or. 99.

An action is pending in the trial court until appeal is perfected, or the time for taking appeal has elapsed: *Dick v. Kendall*, 6 Or. 166; *Garrison v. Cheeney*, 1 W. T. 489.

Application for continuance in the name of personal representatives of deceased party if made within a year is

**Practice** (continued).

in time, though the order be not made until after the expiration of the year: *Id.*

Power of a court of equity, where attorney is guilty of negligence or misconduct to the rights of his client, to grant relief in a summary manner: *Branson v. Or. R'y Co.*, 10 Or. 278.

A party must object to the verification of an account furnished on demand within a reasonable time, or the objection is waived: *Robbins v. Benson*, 11 Or. 514.

Where remedy is not pointed out by Code, suitable process may be adopted conformable to the Code: *Aiken v. Aiken*, 12 Or. 203; *Carter, Rice, & Co. v. Koshland*, 13 Or. 615.

Courts are invested with large discretionary powers in matters of practice: *Mitchell v. Campbell*, 14 Or. 454.

A party in court must take notice of all orders of the court in the case, and all pleadings filed: *Williams & Co. v. Miller & Co.*, 1 W. T. 88.

An attorney may discontinue a suit by virtue of his general power: *Simpson v. Brown Bros. & Co.*, 1 W. T. 247.

Right of court to refuse to hear attorney representing different parties to the suit whose interests are conflicting: *Id.*

Court will not allow issue to be joined, where both parties are represented by the same attorney: *Clarke Co. v. Commissioners of Clarke Co.*, 1 W. T. 250.

Professional confidence once reposed cannot be divested by expiration of the professional employment; court refuses to hear attorney formerly on the other side of the case: *Nickels v. Griffin*, 1 W. T. 374.

Civil practice in law and equity, as affected by the several codes successively adopted, and by the rules of the Supreme Court of the United States: *Garrison v. Cheeney*, 1 W. T. 489.

**Practice of Medicine.** See Physicians and Surgeons.

**Precincts.** See Elections.

**Pre-emption.** See Public Lands.

**Preferences.** See Assignment for Benefit of Creditors.

**Prescription.** See Adverse Possession; Easements; Water and Watercourses.

**Presumptions.** See Appeal and Error; Evidence; Jurisdiction.



**Principal and Agent.** See Agency.

**Principal and Surety.** See Suretyship.

**Prior Appropriation.** See Water and Watercourses.

**Priority.** See Chattel Mortgages; Deeds; Liens; Mortgages.

**Privity.** See Deeds; Judgments and Decrees; Notice.

**Probable Cause.** See Malicious Prosecution; Slander and Libel.

**Probate Courts.** See Administration; County Courts; Courts; Jurisdiction.

**Process.** See Appeal and Error; Attachments; Executions, and Proceedings Supplemental; Jurisdiction; Practice; Summons.

**Professional Skill.** See Physicians and Surgeons.

**Promise of Marriage.** See Marriage.

**Promissory Notes.** See Bills and Notes.

**Protest.** See Bills and Notes.

**Provisional Government.** See Constitutional Law.

**Public Lands.** See Constitutional Law; Dedication; Eminent Domain.

1. POSSESSION, PRE-EMPTION, AND PURCHASERS' RIGHTS.

2. TOWN SITES.

3. MINERAL LANDS.

4. DONATION ACT.

5. SCHOOL LANDS.

6. SWAMP AND TIDE LANDS.

7. HOMESTEADS.

8. PATENTS AND CERTIFICATES.

1. POSSESSION, PRE-EMPTION, AND PURCHASERS' RIGHTS.

Courts have power to protect settlers' possessory rights from invasion: *Woodsides v. Rickey*, 1 Or. 108; *Lee v. Simonds*, 1 Or. 158; *Colwell v. Smith*, 1 W. T. 92; *Ward v. Moorey*, 1 W. T. 104.

State courts entertain no proceedings dependent upon facts to be determined in the United States land-office: *Moore v. Fields*, 1 Or. 317; *Colwell v. Smith*, 1 W. T. 92; *Ward v. Moorey*, 1 W. T. 104; *Shockley v. Brown*, 1 W. T. 463.

Mere possessor who abandoned without gaining title could not charge land with easement: *Lownsdale v. Portland*, 1 Or. 381.

Rights of British subjects during joint occupancy merely possessory: *Cowenia v. Hannah*, 3 Or. 465.

**Public Lands** (continued).

Effect of treaty of 1846, upon rights of occupants: *Id.*;  
Puget Sound Agricultural Co. v. Pierce Co., 1 W. T. 159.

Counties in Oregon cannot pre-empt land for county seat under act of May 26, 1824: *Whitlów v. Reese*, 4 Or. 335.

Grant to the state, by act of 1841, operated as a present grant upon admission of the state into the Union, subject to future selection and identification: *Wardwell v. Paige*, 9 Or. 517.

Pre-emption from state, omitted by treasurer in his statement of lands sold, may be proved by other evidence: *Id.*

Pre-emption by settler on state lands acquired under act of Congress of September 4, 1841, held superior to title of one claiming the land as school land: *Id.*

Notice to subsequent purchasers of claims of pre-emptors need not be proved; rule of *caveat emptor* applies to subsequent purchasers: *Id.*

Pre-emptor, who has entered, may sell before patent issues: *Richards v. Snyder and Crews*, 11 Or. 501.

Treaty of 1846, adjusting the boundaries and rights of the United States and Great Britain, and expressly preserving to the Puget Sound Agricultural Company its property rights, is but declaratory of the law of nations in the latter respect: *Puget Sound Agricultural Co. v. Pierce Co.*, 1 W. T. 159.

Possessory and property rights of individuals are undisturbed by change of sovereignty: *Id.*

The treaty operated to vest title in said company, as a legislative act to that effect: *Id.*

The fact that the lands had not been segregated from the public domain would not prevent title from vesting in the company: *Id.*

Though the legal title be in the United States, the company has such equitable interest as is subject to taxation: *Id.*

Possessory right to the land of said company, the title to which is still in the United States, is a good defense in action of ejectment brought by lessee of the company: *Roberts v. Lucas*, 1 W. T. 205.

On decease of intestate pre-emptor, whose title is still inchoate, a salable possessory right passes to the ad-

**Public Lands (continued).**

administrator: *Burch v. McDaniel and Johnson*, 2 W. T. 58.

Duty of such administrator to perfect the title of the land in favor of the heirs: *Id.*

Aside from such duty, administrator is free to dispose of the possession for the benefit of the estate: *Id.*

Pre-emption statutes place the restriction on the administrator which was on the pre-emptor, against transferring any interest in the land: *Id.*

In action of ejectment, where plaintiff claims under certificate of purchase, defendant may show a certain state of facts by reason whereof the commissioner caused such certificate to be canceled: *Hays v. Parker*, 2 W. T. 198.

Where in the course of trial in such action it appears that the claims of the parties at the time of the commencement of the action were being waged, and not fully determined in the department of the interior, the action should be dismissed at plaintiff's cost: *Id.*

Decision of the secretary of the interior upon mixed questions of law and fact properly presented for his decision cannot be reviewed in a court of equity, fraud or mistake not being alleged: *Starks v. Brown*, 2 W. T. 426.

**2. TOWN SITES.**

Town-site act of Congress, passed May 23, 1844, not applicable to Oregon before 1854: *Marlin v. T'Vault*, 1 Or. 77; *Lownsdale v. Portland*, 1 Or. 381; *Starr v. Stark*, 2 Or. 118; *Whitlow v. Reese*, 4 Or. 336.

By entry and payment under town-site act, town became at once vested with legal title in trust: *Eakin v. McCraith*, 2 W. T. 112.

**3. MINERAL LANDS.**

Rights of occupancy under act of Congress of July 26, 1866: *Gold Hill Q. M. Co. v. Ish*, 5 Or. 104.

Provisions relative to pre-emption not obligatory: *Id.*

Patent for agricultural land does not pass known deposits of precious metals: *Id.*

Failure of government surveyors to segregate mining land from agricultural land does not defeat rights of occupant miners: *Id.*

**4. DONATION ACT.**

Land settled as town sites may be held as donations: *Marlin v. T'Vault*, 1 Or. 77.

**Public Lands** (continued).

Settler with Indian wife is "married" man within the fourth section of the act: *Vandolf v. Otis*, 1 Or. 153.

Residence is determined by the facts in each case: *Lee v. Simonds*, 1 Or. 158.

Claim need not be in "compact form" to enable courts to protect possessory rights; and whether it be in such form will be left to the determination of the land-office: *Id.*

If settler die before the law took effect, his heirs do not inherit or hold by virtue of his residence or cultivation: *Ford v. Kennedy*, 1 Or. 167; *Cowenia v. Hannah*, 3 Or. 465; *Newton v. Spencer*, 3 Or. 548.

Occupant cannot be dispossessed by action at law before the completion of his residence and cultivation, when the surveyor-general has determined contest in his favor: *Pin v. Morris*, 1 Or. 230.

Donee may maintain action, under the statute, for the recovery of real property, against one who shows no title except possession: *Keith v. Cheeny*, 1 Or. 285.

If wife die before compliance with act, without issue, husband does not take her half of the claim: *Johnson v. McGinniss*, 1 Or. 292; *White v. Allen*, 3 Or. 103.

Donation law was the first act of Congress affecting public lands in Oregon: *Lownsdale v. Portland*, 1 Or. 381.

Mere possessor prior to September 27, 1850, who abandoned land, could charge it with no easement: *Id.*

Dedication prior to time law took effect void, title being in the United States: *Leland v. Portland*, 2 Or. 46.

Claimant must set land apart by boundaries, and a change of location is abandonment: *Carter v. Chapman*, 2 Or. 93.

What residence and cultivation sufficient: *Starr v. Stark*, 2 Or. 118.

Rights of donee under the donation law: *Lee v. Summers*, 2 Or. 260; *Brazee v. Schofield*, 2 W. T. 209.

Settler on land before law took effect has sufficient interest to be able to attack patent to the land issued to one not entitled: *White v. Allen*, 3 Or. 103.

Claimant, before patent, has an interest subject to judicial sale: *GrosLouis v. Northcut*, 3 Or. 394.

On death of settler before proof made, his right descends to his heirs, who may make proof: *Delay v. Chapman*, 3 Or. 459.



**Public Lands (continued).**

The right so acquired by the heirs is not an estate which could be encumbered or administered upon: *Id.*

When such heirs prove and obtain patent, they take by purchase, not by inheritance: *Id.*

After heirs obtain patent, they have an estate which they can encumber, alien, or devise: *Id.*

In the estate acquired, or to be acquired, by such heirs, the administrator has no right or interest: *Id.*

British subject in possession under treaty of 1846 gains no rights by donation law: *Cowenia v. Hannah*, 3 Or. 465.

The act makes no provision for one dying before its passage; it only provides for persons *in esse*: *Id.*

Descent of lands granted under section 5 of the act, not limited by section 4: *Chambers v. Chambers and Maury*, 4 Or. 153.

Lands granted under section 5 of said act descend in accordance with the provisions of the statute of descents and the common law: *Id.*

Act operated as a present grant, and vested in donee the fee, subject to conditions subsequent: *Blakesly v. Caywood*, 4 Or. 279; *Dolph v. Barney*, 5 Or. 191.

Though under the fourth section of the act, no alien is entitled to patent until naturalized, the grant is not void where before patent issues alien dies before naturalization, and his heir takes: *Id.*

The right of the wife to one half of the claim does not depend on the number of acres taken: *Jette v. Picard*, 4 Or. 296.

Upon compliance with the requirements, the title vests by virtue of the act itself: *Dolph v. Barney*, 5 Or. 191; *Brazee v. Schofield*, 2 W. T. 209; *Maynard v. Hill*, 2 W. T. 321.

Title may be conveyed before patent, after the requirements have been complied with: *Id.*; *Ramsey v. Loomis*, 6 Or. 367.

Sale by man and wife before patent binds heirs of wife to whom her patent subsequently issues: *Id.*

The twenty-second section embraces two classes of widows capable of taking: *Blachley v. Butler*, 5 Or. 463.

Wife's interest and right is perfected in her by virtue of

**Public Lands** (continued).

- residence and cultivation without further act: *Murray v. Murray*, 6 Or. 26; *Springer v. Young*, 14 Or. 280.
- Wife's right under the Donation Act is not affected by the repeal of the act of the legislature of 1852, which provided that her interest should be under her separate control: *Linnville v. Smith*, 6 Or. 202.
- Land claimed under the act is "segregated" when the notification is filed: *Ramsey v. Loomis*, 6 Or. 367.
- Widow is entitled to dower in husband's claim, conveyed by him after complying with the act, but before he received a patent: *McKay v. Freeman*, 6 Or. 449.
- Otherwise, where the residence and cultivation were not complete before husband's death: *Farris v. Hayes*, 9 Or. 81.
- Holder of title bonds to donation claim has sufficient estate, before patent, to redeem at tax sale: *Rich v. Palmer*, 7 Or. 133.
- Dower attaches in favor of widow, under section 4, where husband dies after residence and cultivation, before securing a patent: *Love v. Love*, 8 Or. 23.
- Husband's estate, after four years' cultivation, and before patent, descends to the children, and the wife takes her half and dower in the husband's half: *Id.*
- Bond for deed, made prior to September 27, 1850, can be enforced against obligee after he obtains patent: *Parker v. Rogers*, 8 Or. 183.
- Claimant under Donation Act, conveying before patent by deed with covenants for further assurance of title, after patent holds naked legal title: *Baker v. Woodward*, 12 Or. 3.
- Amendment of 1870, to section 378, Civil Code (sec. 382, Hill's A. L.), respecting limitations of actions between claimants, was intended to apply only to controversies arising under section 501, between rival claimants to the same tract as patentees: *Id.*
- Conveyance by deed, without covenants, of riparian rights, by claimant, before completion of his term of residence and cultivation, passes no title: *McCann v. Oregon R'y etc. Co.*, 13 Or. 455.
- Title of husband in lands, purchased in his name with proceeds of sale of his own and the wife's half of dona-

**Public Lands (continued).**

tion claim, is subject to an implied trust in favor of wife for an undivided half: *Springer v. Young*, 14 Or. 280.

No evidence in this case to show that donation claimant was without heirs capable of taking his estate: *Ward v. Moorey*, 1 W. T. 104.

The oath required under section 12 of the act may be taken at time of final proof: *Id.*

Dower extends to donation claims; the right of eminent domain reserved does not defeat the right of dower therein: *Ebey v. Ebey and Beam*, 1 W. T. 185.

Plaintiff claiming under Donation Act need not set forth in his complaint that the land was not within a mile of a military post or reservation. If advantage is to be taken of this fact, it must be as a defense: *Shockley v. Brown*, 1 W. T. 464.

Title could not be acquired before 1850, without first making affidavit to the several requirements prescribed by section 12 of the act: *Id.*

Complaint seeking to establish title under the act must allege compliance with the several requirements under section 12 of the act: *Id.*

Period of residence accepted by the United States, as compliance on the part of the settler, cannot be questioned by one not claiming under a prior grant: *Bulene v. Garrison*, 1 W. T. 587.

Possession under quitclaim deed executed before the expiration of the four years' residence is possession under contract prohibited by law, and gives no color of title: *Id.*

Right of wife is merely inchoate until the requirements of the act, in residence and cultivation, and other respects, have been complied with: *Maynard v. Valentine*, 2 W. T. 3; *Maynard v. Hill*, 2 W. T. 321.

The statute contemplates residence and cultivation by wife as well as husband: *Id.*

*Quære*, whether wife might not reject this gift of the government, by refusing to partake of the husband's domicile: *Id.*

The act, and not the patent, is the instrument which effects the transfer of title; the latter only evidences

**Public Lands (continued).**

title, and relates back to the act: *Brazee v. Schofield*, 2 W. T. 209.

Claimant under patent issued to widow and heirs of a deceased donation claimant is estopped from denying that such widow and heirs acquired title under the act: *Id.* Residence and cultivation of man after divorce is that of a single man: *Maynard v. Hill*, 2 W. T. 321.

Wife who was divorced before husband had completed his residence and cultivation, though out of the state at the time the act took effect, acquires no rights under the act, not having complied with the requirements of residence and cultivation: *Id.*

**5. SCHOOL LANDS.**

Register of state lands in the La Grande District acts simply as agent for the commissioners, and no appeal lies from his decision to Circuit Court: *Anderson v. Laughery*, 3 Or. 277.

Judicial notice is taken of laws by which school superintendent sells to private person: *Dolph v. Barney*, 5 Or. 192.

His deed, if regular on its face, is *prima facie* evidence of his power to convey: *Id.*

First applicant, after the six months allowed for settlers to apply, is entitled to preference in sale: *Hurst v. Hawn*, 5 Or. 275.

Decision of commissioners is conclusive on the state, but does not prevent a party from showing that the deed was fraudulently obtained: *Id.*

In foreclosure suits by the commissioners, the district attorney is entitled to prosecute, and to secure the statutory fee, though other counsel may be employed to assist: *Claim of Ison*, 6 Or. 465.

Otherwise, where the state is not a party of record: *Hazard's Appeal*, 9 Or. 366.

Board of commissioners is not an inferior tribunal, but a co-ordinate branch of the state government: *Corpe v. Brooks*, 8 Or. 222.

Its decisions are not subject to review by the courts: *Id.* But a court of equity may decree patentee to hold as trustee for one having better equitable title: *Wardwell v. Paige*, 9 Or. 517.



**Public Lands (continued).**

Purchaser has a right to sever timber before completing payments: *Schmidt v. Vogt*, 8 Or. 344.

The title to funds arising from the sale of school lands is in the state: *State v. Chadwick and Brown*, 10 Or. 423.

State, and not the commissioners, should sue for an accounting as to such funds: *Id.*

Commissioners' power and authority over such funds; evidence in suit for an accounting: *Id.*

**6 SWAMP AND TIDE LANDS.**

Act of September 28, 1850, was extended to Oregon by act of March 12, 1860: *Gaston v. Stott*, 5 Or. 48.

Operated as a grant *in presenti* to the state, passing fee-simple title: *Id.*

Patent provided for in section 2 operates as further assurance of title: *Id.*

The trust raised by the act of 1850 is a personal not a property trust, and does not run with the land: *Id.*

State could select and dispose of swamp-lands before patent is issued by the general government of the United States: *Id.*

Proviso of section 1, act of 1860, does not operate as a limitation upon the grant: *Id.*

State lost no rights by not making selection within two years: *Id.*

The provision of the second section of the act of 1860, in relation to the time within which selections were to be made by the state, is directory, and the state loses no right by not strictly complying therewith: *Id.*

The sovereignty of the state to tide-lands attached on its admission to the Union: *Hinman v. Warren*, 6 Or. 408.

The United States has no power to dispose of tide-lands within the territory before the admission of the state, and its deed to such land is void: *Id.*

A grant of the United States can extend only to the meander line of high tide: *Id.*; *Parker v. Taylor*, 7 Or. 435.

State has the exclusive right to sell the tide-lands, and a shore-owner, complying with the act in purchasing, may erect wharves from his land into navigable water, provided he does not impede navigation: *Id.*

Accretions added to lands of a riparian owner on a navi-

**Public Lands (continued).**

gable stream cannot be entered as swamp-lands: *Minto v. Delaney*, 7 Or. 337.

Such owner takes to the stream, and not merely to a meander line improperly located by United States survey: *Id.*

Application to file on such land as swamp-land is void, and casts no cloud on owner's title: *Id.*

The state owns the tide-lands, and may sell them: *Parker v. Taylor*, 7 Or. 435.

Grantee of riparian owner has exclusive right to a deed from the state, if he applies in time: *Parker v. Rogers*, 8 Or. 183.

Legislature has recognized and favored the rights of purchasers of tide-lands from riparian owners: *Id.*; *De Force v. Welch*, 10 Or. 507.

Purchaser of tide-lands under act of 1872, held to be no trustee for one claiming to be the equitable owner thereof: *Shively v. Parker*, 9 Or. 500.

Sovereign acquires title to land gradually submerged by the sea: *Wilson v. Shiveley*, 11 Or. 215.

Owners of abutting property entitled to purchase tide-land: *Id.*

Patent obtained by purchaser, fraudulently representing himself the owner of the land adjoining tide-land, will be canceled in equity, and the land conveyed to the owner of the abutting property: *Id.*

Riparian owner's rights are not derived from the state, though held in subordination to the rights of the public: *Wilson v. Welch*, 12 Or. 353.

*Quære*, whether shore-owner purchasing abutting tide-lands under act of 1872 gains any rights that he had not before: *Id.*

The right given to shore-owner by that act is a mere option to purchase, not an equitable title: *Id.*

Tide-lands are lands covered by ordinary tides, that between ordinary high and low water mark, and must be alternately covered and left dry by ordinary tides: *Andrus v. Knott*, 12 Or. 501.

Lands on navigable streams, where the tide ebbs and flows, may be tide-lands, but not lands covered with water three fourths of the year: *Id.*

**Public Lands (continued).**

Effect of repealing clause of 1878 (c. 52, Hill's A. L.) was to take away unexercised right of preference to shore-owners in buying tide-lands from the state: *Olney v. Moore*, 13 Or. 238.

Owners who had already availed themselves of their right to purchase were not affected by the repeal: *Id.*

State having sold to a fraudulent purchaser, its power is exhausted, and it cannot sell to another: *Id.*

But suit in equity by the abutting owner lies against such fraudulent purchaser to have his title inure to the party entitled to it: *Id.*

This right of suit is not cut off by the repeal of the act giving the right to abutting owner to purchase, but only by general statute of limitations: *Id.*

Shores of navigable streams are not the property of the United States, but of the state: *Johnson v. Knott*, 13 Or. 308.

The point to which water usually arises in an ordinary season is the true meander line and boundary of the United States: *Id.*

Tide-land act of 1874 refers only to such land as was subject to sale, and was susceptible of cultivation and reclamation: *Id.*

**7. HOMESTEADS.**

Homestead commuted by pre-emption, so that patent is obtained before the five-years' residence, is not liable for debts incurred prior to patent: *Clark v. Bayley*, 5 Or. 343.

Entry of homestead by one in trust for another will not be recognized, or the trust enforced in equity: *Id.*

Lien of judgment for costs in a criminal case does not attach to homestead before patent: *State v. O Neil*, 7 Or. 141.

One who has taken the preliminary steps to secure homestead is entitled to the aid of equity to put him in possession, when prevented from entering by one without title: *Kitcherside v. Myers*, 10 Or. 21.

Such person in possession has sufficient title and possession to maintain action for trespass by cattle upon his claim: *French v. Cresswell*, 13 Or. 418.

**Public Lands** (continued).

Contracts for sale of soldiers' additional homestead scrip are void: *Mackintosh v. Renton*, 2 W. T. 121.

**8. PATENTS AND CERTIFICATES.**

Certificates are issued by register and receiver, who are the successors of the surveyor-general: *Keith v. Cheeny*, 1 Or. 285.

Certificate is evidence of residence, cultivation, and other facts recited: *Id.*; *Willamette Co. v. Gordon*, 6 Or. 175.

Patent may be attacked and set aside for fraud: *Starr v. Stark*, 2 Or. 118.

A patent issued to city of Portland, unimpeached by better title, was held valid for the purposes of this case: *Id.*

To set aside patent, party attacking must have such right in law as to be able to claim the same from the government: *Lee v. Summers*, 2 Or. 260.

Patent issued to wrong person not void; passes title, but patentee is trustee for the benefit of the rightful claimant: *White v. Allen*, 3 Or. 103.

Patent is proof of the regularity of the preliminary proceedings: *Id.*

Patent under swamp-land act of 1850 operates merely as a further assurance of title: *Gaston v. Stott*, 5 Or. 48.

To agricultural land does not pass known deposits of precious metals: *Gold Hill Q. M. Co. v. Ish*, 5 Or. 104.

Issuance of a patent under the Donation Law is a mere ministerial act; title may be conveyed before patent is obtained: *Dolph v. Barney*, 5 Or. 191.

Private parties cannot use the name of the state to try out a question of title between themselves on the pretense of annulling a patent: *Wilson and Wakeman v. Shively*, 10 Or. 267.

Patent to tide-land, obtained by one fraudulently representing himself the owner of abutting property, will be canceled in favor of the owner: *Wilson v. Shiveley*, 11 Or. 215.

Certificate issued by the state to applicant for swamp-land conveys a present interest: *Wattier v. Miller*, 11 Or. 329.

Courts will uphold a description approved by the executive department of the United States, under the



**Public Lands (continued).**

Donation Act, though loose and somewhat indefinite: *Shockley v. Brown*, 1 W. T. 463.

Ordinarily the issuance of patent is such final decision by the executive department respecting the title that courts will have jurisdiction, especially in favor of the party seeking to set it aside: *Id.*

In action of ejectment, where plaintiff claims under certificate of purchase, defendant may show a certain state of facts by reason whereof the commissioner caused such certificate to be canceled: *Hays v. Parker*, 2 W. T. 198.

The act, and not the patent, passes title to donation claimant; the latter merely evidences the title and relates back to the act: *Brazee v. Schofield*, 2 W. T. 209.

**Public Nuisances.** See Nuisances.

**Public Policy.** See Contracts.

**Public Use.** See Dedication; Eminent Domain.

**Puget Sound.**

With its multitude of arms and inlets, is an arm of the sea: *Smith v. United States*, 1 W. T. 262.

Admiralty jurisdiction of the United States extends over Puget Sound: *Id.*

**Quantum Meruit.** See Assumpsit.

Failure to complete contract to furnish work and materials, for any reason except voluntary abandonment, does not preclude recovery of the reasonable value for the part done: *Steeple v. Newton*, 7 Or. 110; *Tribou v. Strowbridge*, 7 Or. 156; *Todd v. Huntington*, 13 Or. 9.

Demand not necessary to be proved in an action to recover reasonable value of attorney's services: *Gibbs v. Davis*, 11 Or. 288.

**Questions of Law and Fact.** See Jury and Jury Trial.

**Quieting Title.** See Cloud on Title.

What sufficient possession to give right to impeach patent of United States: *Starr v. Stark*, 2 Or. 118.

Possession of plaintiff must be lawful to allow him to maintain suit under section 500 of the Code (sec. 504, Hill's A. L.): *Tichenor v. Knapp*, 6 Or. 205.

Possession of one holding by deed alone, sufficient in case of wild lands under that section: *Thompson v. Wolf*, 8 Or. 454.

**Quieting Title** (continued).

In a suit under section 500 (sec. 504, Hill's A. L.), where the plaintiff attempts to show that the adverse claim amounts to a cloud, he must allege the facts showing the apparent validity, and the real invalidity of the instrument clouding his title: *Teal v. Collins*, 9 Or. 89.

In such suit, where the right claimed is equitable, and not legal, and plaintiff is out of possession, the objection that plaintiff has a remedy at law comes too late after answer to the merits: *Kitcherside v. Myers*, 10 Or. 21.

Plaintiff must be in actual possession, under that section to maintain suit: *Coolidge and McClaine v. Forward and Heneky*, 11 Or. 118.

The remedy under section 500 (sec. 504, Hill's A. L.) does not affect the chancery jurisdiction, outside of the statute, to remove cloud: *Id.*

Equity will not try out a question of dry legal title where objection to jurisdiction is properly taken: *Id.*

Adverse claim under section 500 (sec. 504, Hill's A. L.) need not amount to a cloud on title: *Murphy v. Sears and Holman*, 11 Or. 127.

**Quitclaim Deeds.** See Deeds.

**Quo Warranto.**

Complaint in action to have officer adjudged disqualified for having offered reward to voter must show that the promise was to benefit the voter: *State v. Church*, 5 Or. 375.

Circuit Court will entertain proceedings under section 354 of the Code (sec. 357, Hill's A. L.) to try the right to municipal office, notwithstanding a municipal board has been given by charter the right to judge of the election of its members: *State v. McKinnon*, 8 Or. 493.

Private relator is not a party, and cannot control the proceeding: *State v. Douglas County Road Co.*, 10 Or. 198.

District attorney has powers of attorney-general at common law in the proceeding: *Id.*

The substitute under the Code for *quo warranto* is identical, except in form, with the common-law proceeding: *Id.*

Private parties cannot use the name of the state to try out a question of title between themselves: *Wilson and Wakeman v. Shively*, 10 Or. 267.

**Quo Warranto** (continued).

Policeman ousted by action of mayor and common council of a city without cause may maintain *quo warranto* proceedings against one appointed to fill his place: *Selby v. Portland*, 14 Or. 243.

The title of the office must be determined in his favor by some such proceeding, or he cannot sue for the salary subsequently accruing: *Id.*

Information in the name of the territory is the proper method of ousting a retired army officer unlawfully holding civil office under the laws of the territory: *Hill v. Territory*, 2 W. T. 147.

**Railway Companies.** See Corporations; Dedication; Eminent Domain; Negligence.

1. AS CORPORATIONS.

2. CONSTRUCTION.

3. DUTIES AND LIABILITIES.

1. AS CORPORATIONS.

Are *quasi* public corporations; public have an interest in their location: *Holladay v. Patterson*, 5 Or. 177.

Chattel mortgage made by president whose powers are confined to the ordinary business of the corporation under corporate seal is void, and no lien: *Luse v. Isthmus Transit R'y Co.*, 6 Or. 125.

Organized under Oregon statutes have no powers but such as are conferred by the statutes or necessarily incidental: *Lakin v. R. R. Co.*, 13 Or. 436.

In absence of statutory authority to lease the road, the duties and liabilities for torts by lessee are not removed from the owning corporation: *Id.*

2. CONSTRUCTION.

Neither railroad nor adjoining owner is required by law to fence the line between them: *Or. Central R. R. Co. v. Wait*, 3 Or. 91.

Damages to owner of land taken: *Id.*

Agent charged with selecting route cannot, for consideration moving to himself, agree on a particular route: *Holladay v. Davis*, 5 Or. 40.

Subscription as donation in consideration of locating the route at certain place instead of adopting a shorter surveyed route, void as against public policy: *Holladay v. Patterson*, 5 Or. 177.

**Railway Companies (continued).**

Legislative grant to a railroad company of use of a previously dedicated public levee in a city, for terminal depots and docks, held a license: *P. & W. V. R. R. Co. v. Portland*, 14 Or. 188.

Such license, saving the rights of the public by express terms, is not inconsistent with the original dedication for levee: *Id.*

Where land was once condemned and paid for, and railroad was built, but afterwards the company learned that another owned the property, in a second action to condemn, the owner is not entitled to put in evidence the value of the railroad improvements to enhance damages: *O. R. & N. Co. v. Mosier*, 14 Or. 519.

Railroad incorporated and organized under special act may proceed to condemn land under the general statute: *Cascades R. R. Co. v. Sohns*, 1 W. T. 557.

**3. DUTIES AND LIABILITIES.**

Not bound to stop train on seeing a man walking on the track; may presume he will get out of the way on sounding the alarm: *Cogswell v. Or. & Cal. R. R. Co.*, 6 Or. 417.

It is gross negligence for deaf person to walk on the track: *Id.*

In action for value of horses killed, evidence of purchase price is not admissible: *Holstine v. Or. & Cal. R. R. Co.*, 8 Or. 163.

Slight negligence will not prevent recovery if negligence complained of was gross: *Id.*

Question of negligence in brakeman putting his head out of the window of moving car should be left to the jury: *Walsh v. Or. R'y & Nav. Co.*, 10 Or. 250.

Company, having agreed to pay certain sums in carriage of freight and passengers, selling the road and rendering performance impossible, the sums are at once due in money: *Branson v. Or. R'y Co.*, 10 Or. 278.

Must so construct and maintain ditches as not to overflow adjoining lands: *Davidson v. Or. & Cal. R. R. Co.*, 11 Or. 136.

This duty is not lessened by lapse of time, or the fact that other persons turn water into the ditch: *Id.*

Liability for ejecting a person from a train, evidence and damages: *Sullivan v. Or. R'y & Nav. Co.*, 12 Or. 392.



**Railway Companies** (continued).

Liability as common or private carriers: *Honeyman v. Or. etc. R. R. Co.*, 13 Or. 452.

Complaint alleging liability as common carriers, no recovery can be had on proof as private carriers: *Id.*

Company not holding out as carrier of dogs, but permitting its servant to take charge of dogs in transporting them, is liable at most as private and not as common carrier: *Id.*

Liable for torts of lessees, where not authorized by statute to lease: *Lakin v. R. R. Co.*, 13 Or. 436.

Construction company employed by owners, being in possession of the road and operating it for traffic purposes, owners are liable for negligence of such company occasioning death: *Id.*

In an action by one injured while coupling a car loaded with projecting rails, held the facts showed want of care on his part, and no gross negligence on the part of the company, and motion for nonsuit should have been sustained: *Scott v. Or. R'y & Nav. Co.*, 14 Or. 211.

Employee continuing in his extra-hazardous employment knowing that the usual manner of the company in doing a particular business to be more hazardous than some other mode, assumes the risk: *Id.*

Trainmen, knowing that at a particular place on the track persons are liable to be walking, are charged with an extra degree of watchfulness at such place: *Cassida v. Or. R'y & Nav. Co.*, 14 Or. 551.

Jury have a right to consider as a circumstance the fact that persons were accustomed for years prior to the time of the accident to walk upon the track at that place: *Id.*

Same degree of prudence is not expected in children as in adults: *Id.*

Hence, evidence that the intestate, a child of seven years, being frightened by cattle, sought refuge on the railroad trestle to make her escape, is admissible to rebut charge of contributory negligence: *Id.*

**Rape.**

Prosecutrix, though a child, if called as a witness must be sworn: *State v. Tom*, 8 Or. 177.

Declarations made at the time, or the fact that prosecu-

**Rape** (continued).

trix made complaint, admissible, but not the particulars of what she then said: *Id.*

**Reasonable Doubt.** See Criminal Law; Homicide.

**Receipts.** See Evidence; Settlement.

**Receivers.**

Not appointed where danger of ultimate loss of partnership property is not shown: *Wellman v. Harker*, 3 Or. 253.

In absence of statute regulating fees of, court appointing may allow reasonable compensation: *Martin v. Martin*, 14 Or. 165.

Order allowing fees is a final order, from which appeal lies: *Id.*

**Recorder.** See Jurisdiction; Justice of the Peace.

**Recording.** See Chattel Mortgages; Deeds; Husband and Wife; Liens; Mortgages; Notice.

**Records.** See Appeal and Error; County Courts; Evidence; Judgments and Decrees; Judgment Roll; Jurisdiction; Practice.

Authentication of record from any state must show judge certifying is presiding judge, or the only judge, of his court: *Pratt v. King*, 1 Or. 49.

But when the record is silent, and it does not appear that there are other judges, it is presumed there is but one judge: *Keyes v. Mooney*, 13 Or. 179.

The official character of the judge must appear from his certificate: *Pratt v. King*, 1 Or. 49.

Entry by judge in his docket, to the effect that a certain demurrer was overruled, is no part of the record: *Willamette Falls etc. Co. v. Smith*, 1 Or. 181.

Court may amend during term to make the record conform to the facts: *Howell v. State*, 1 Or. 241.

When judgment is rendered, the record should show unequivocally what was adjudicated: *Dray v. Crich*, 3 Or. 298.

How far the record is conclusive of jurisdiction; recitals; evidence in aid of, or to dispute: *Heatherly v. Hadley and Owen*, 4 Or. 1; *Tustin v. Gaunt*, 4 Or. 305.

Under the Code, record includes all papers and proceedings contained in judgment roll: *Tustin v. Gaunt*, 4 Or. 305.

**Records (continued).**

Erasures in a record used to contradict certified copy, erasures must be explained: *Dolph v. Barney*, 5 Or. 192.

Failure of officer of inferior tribunal to record proceedings remedied by proceedings to complete the record; supervisory control of Circuit Court: *Road Co. v. Douglas County*, 5 Or. 373.

The right to *nunc pro tunc* order to correct the record: *Road Co. v. Douglas County*, 5 Or. 406; *Tompkins v. Clackamas County*, 11 Or. 364; *Carter, Rice, & Co. v. Koshland*, 12 Or. 492; *Lee v. Imbrie*, 13 Or. 510; *Hays v. Miller*, 1 W. T. 143; *Hale v. Finch*, 1 W. T. 517.

Index is no part of the records of deeds; deed recorded and not indexed operates as notice: *Board of Com. v. Babcock*, 5 Or. 472.

Record of contract of County Court, duly attested, how far conclusive: *Road Co. v. Douglas County*, 6 Or. 299.

Attorney cannot change legal effect of a notice of appeal on file by adding proof of service: *Briney v. Starr*, 6 Or. 207.

Contract by County Court, though not in the form of an order, is entitled to record in the journal: *Road Co. v. Douglas Co.*, 6 Or. 299.

The whole record, and not the petition alone, will be examined in ascertaining whether a Probate Court has jurisdiction to admit a will to probate: *Moore v. Wilamette T. & L. Co.*, 7 Or. 359.

A petition found with the record, and apparently acted upon by the court, is deemed to have been filed unless the contrary appear, though not marked "filed": *Id.*

Cannot be impeached by affidavits showing recital of appearance, and answering to be untrue: *Cauthorn v. King*, 8 Or. 138.

Discretionary with court to change record showing arraignment of prisoner when conflicting affidavits as to its correctness are filed: *State v. Lee Ping Bow*, 10 Or. 27.

Certificate of officer, to a copy of judgment record of another state, need not contain statement that he compared the copies with the original: *Bloomfield v. Humason*, 11 Or. 229.

**Records** (continued).

A manifest clerical error in date in authentication should be disregarded: *Keyes v. Mooney*, 13 Or. 179.

Report of referee is no part of judgment roll, and cannot be considered on appeal in an action at law: *Osborn v. Graves*, 11 Or. 526.

**Recoupments.** See Set-offs and Counterclaims.

Recoupment of damages for breach of warranty of an engine, in an action for the price: *Drake v. Sears*, 8 Or. 209.

Partial failure of consideration may be set up as a defense to an action on a bill of exchange, and the defendant recoup his damages, though unliquidated: *Davis v. Wait*, 12 Or. 425.

**Redemption.** See Executions, and Proceedings Supplemental; Mortgages; Taxation.**Reference.** See Arbitration and Award.

Judgment on award void if report is made by the referees after their authority expires: *Hanner, Jennings, & Co. v. Coffin*, 1 Or. 99.

Trials before referee proceed in same manner as to order of proof as in trial before court: *Stimson v. Estes*, 3 Or. 521.

Referee has same authority as court in directing trial, and deciding incidental questions: *Id.*; *Bohlman v. Coffin and Carter*, 4 Or. 313.

A copy made and certified to by him will be sufficient, instead of the original offered in evidence: *Id.*

In an action at law involving the examination of long accounts, court may refer without the consent of the parties: *Tribou v. Strowbridge*, 7 Or. 156.

Section 219 of the Code (sec. 222, Hill's A. L.), giving the court such power, is not in violation of the right to jury trial: *Id.*

Court may order a reference in order to ascertain the amounts of rents and profits collected by a mortgagee in possession: *Renshaw v. Taylor*, 7 Or. 315.

Referee, for an accounting between partners, should ascertain what the profits were, not what they should have been: *Boire v. McGinn*, 8 Or. 466.

Findings by referees in equity cases stand as a verdict, and will not be reversed unless clearly against the weight of evidence: *Fahie v. Lindsay*, 8 Or. 474; overruled, *O'Leary v. Fargher*, 11 Or. 225.



**Reference** (continued).

Nor reviewed by the Supreme Court, where objections were not made below: *State v. Grover, Chadwick, & Fleischner*, 10 Or. 66.

Findings will not be reviewed in action at law unless there was no evidence to sustain them: *Williams v. Gallick*, 11 Or. 337.

Failure to find on immaterial issue of fraud is not error: *Id.*

Report of a referee is no part of the judgment roll, and cannot be considered on appeal in an action at law: *Osborn v. Graves*, 11 Or. 526.

A referee to take testimony is appointed only to take the oral proofs in the case: *Baker v. Woodward*, 12 Or. 3.

Written documents, especially when proved by being authenticated as provided by statute, may be put in evidence at the hearing: *Id.*

**Reformation of Instruments.** See Mistake and Accident.

Testimony must be clear and conclusive to warrant relief: *Newsom v. Greenwood*, 4 Or. 119; *Lewis v. Lewis*, 4 Or. 177; *Stephens v. Murton*, 6 Or. 193.

What complaint must show in suit to reform deed on the ground of mistake: *Lewis v. Lewis*, 5 Or. 169; *Ramsey v. Loomis*, 6 Or. 367.

Court will make a valid contract operate, but cannot make a void contract good: *Evarts v. Steger*, 6 Or. 55.

Administrator's bond failing to express penal sum cannot be reformed: *Id.*

Where complaint alleges mistake, and not fraud, reformation will not be granted for fraud: *Stephens v. Murton*, 6 Or. 193.

But where the complaint is ambiguous in this respect, the relief will be granted if the objection was not taken at the proper time, but was waived by answering: *Baldock v. Johnson*, 14 Or. 542.

Complaint must show what the true terms of the contract are, and the mistake: *Stephens v. Murton*, 6 Or. 193.

**Register and Receiver.** See Public Lands.

**Registering.** See Chattel Mortgages; Deeds; Elections; Husband and Wife; Liens; Mortgages; Notice.

**Rehearing.** See Appeal and Error.

**Removal of Causes.**

Order partially removing a cause to the United States court on ground of citizenship of part of defendants is not reviewable in Supreme Court: *Fields v. Lamb*, 2 Or. 340.

Such order does not affect a substantial right or prevent a judgment or decree within section 525 of the Code (sec. 535, Hill's A. L.): *Id.*

Act of Congress, March 2, 1867, does not repeal act of July 27, 1866, so as to deprive Circuit Court of right to make such order: *Id.*

**Rents and Profits.** See Landlord and Tenant; Mesne Profits.

**Repeal of Statutes.** See Statutes.

**Replevin.**

Costs where plaintiff recovers part of property only cannot be divided: *McDonald v. Evans*, 3 Or. 474.

Action under the Code is substantially replevin, and is governed by same principles in demand or refusal: *Moser v. Jenkins*, 5 Or. 447.

Affidavit for immediate delivery is no part of pleadings: *Id.*

Defendant may plead property in himself or another in bar, and if he recovers judgment, is entitled to a return: *Spores v. Boggs*, 6 Or. 122.

The plaintiff must recover on the strength of his own title, and not the weakness of that of the defendant: *Id.*

Officer cannot justify under levy on personalty in the hands of third person: *Spaulding v. Kennedy*, 6 Or. 208.

If wrongful taking is proved, plaintiff is entitled no nominal damages at least: *Id.*

Pledgee of personal property cannot deliver possession on satisfaction of his claim to any one but his pledgor, and a stranger cannot recover possession from him: *Dean v. Lawham*, 7 Or. 422.

Verdict for damages, without finding ownership or value will not sustain judgment: *Jones v. Snider*, 8 Or. 127.

General verdict is not presumed to include special issues, necessary to be passed on where the statute requires special findings thereon: *Id.*

What is sufficient complaint in action on undertaking in replevin: *Cooper v. McGrew*, 8 Or. 327; *Boyer v. Fowler*, 1 W. T. 101; *Meigs v. Keach*, 1 W. T. 305.

# **Replevin (continued).**

Replevin does not lie against officer for goods levied upon, after verdict of sheriff's jury thereon against the claimant: *Remdall v. Swackhamer*, 8 Or. 502; *Capital Lumbering Co. v. Hall*, 9 Or. 93; *Hexter v. Schneider*, 14 Or. 184.

If, after delivery to plaintiff, he fails to prosecute his action, defendant is entitled to dismissal with costs; but must prove his right to the property or its value, if he demands judgment for return thereof: *Capital Lumbering Co. v. Hall*, 10 Or. 202.

To entitle defendant to a return or the value, the answer and proof must show his right affirmatively: *Id.*

Action may be maintained for the recovery of property exempt, and duly claimed as such, notwithstanding it has been ordered sold under section 155 of the Code (sec. 157, *Hill's A. L.*), in an attachment suit: *Berry v. Charlton*, 10 Or. 362.

The fact that defendant took possession without fraud or intention to do wrong does not make the taking lawful: *Surles v. Sweeney*, 11 Or. 21.

Demand is not necessary where the taking was wrongful, although the property has since been transferred to a *bona fide* purchaser: *Id.*; *Hexter v. Schneider*, 14 Or. 184; *Moorhouse v. Donaca*, 14 Or. 430.

Description of goods in complaint and judgment must be reasonably certain: *Foredice v. Rinehart*, 11 Or. 208; *Prescott v. Heilner*, 13 Or. 200; *Guille v. Wong Fook*, 13 Or. 577.

"Sixteen and two fifteenths barrels of flour, the property described in the complaint," sufficient identification of the property in the judgment: *Id.*

Where no immediate delivery is had in the action, and the defendant keeps possession, he cannot object to the sufficiency of the description in the complaint: *Id.*

Affidavit is the foundation of jurisdiction of order for immediate delivery: *Carlton v. Dixon*, 12 Or. 144.

Though the directions to the officer are indorsed on the affidavit by the plaintiff instead of the justice of the peace, the sureties are liable on the bond: *Id.*

Failure to allege the place from which the property was taken is cured by verdict: *Kirk v. Matlock*, 12 Or. 319; *Moorhouse v. Donaca*, 14 Or. 430.

**Replevin** (continued).

Justice has jurisdiction irrespective of where the cause of action arose if the other jurisdictional facts exist: *Id.*  
Description and valuation in complaint of mare and her colt together is sufficiently certain: *Prescott v. Heilner*, 13 Or. 200.

Verdict in favor of party having possession need not assess value: *Id.*

In such case a finding that he is "entitled to the return thereof" would be out of place: *Id.*

Verdict failing to find as to damages for detention is not defective; presumed that jury found no damage: *Id.*

Defendant must plead special property in himself as a defense, and cannot prove it under the general issue: *Guille v. Wong Fook*, 13 Or. 577.

*Semble*, that the defendant can prove absolute ownership in himself or another, under the general issue: *Id.*

Verdict and judgment must identify the property with certainty: *Id.*

"Forty-nine of the hogs described in the complaint," the complaint describing sixty-eight generally, is too indefinite in verdict and judgment: *Id.*

Claim by the defendant upon demand made that the property is his is inconsistent with and a waiver of a claim of a lien thereon: *Id.*

No demand necessary before suit to recover, from purchaser under execution sale, goods seized on attachment as the property of a third person, but which belong to plaintiff: *Hexter v. Schneider*, 14 Or. 184.

Verdict of sheriff's jury on the question of ownership will protect the officer, but does not conclude the claimant from bringing replevin against the purchaser: *Id.*

Sureties on replevin bond are liable for costs and for interest by way of damages for the breach, when judgment goes against plaintiff: *Carlton v. Dixon*, 14 Or. 293.

Such liability is limited to the penalty expressed in the bond: *Id.*

The action is local, and a complaint which only alleges wrongful taking in the county where the action is brought is bad on demurrer: *Moorhouse v. Donaca*, 14 Or. 430.



**Replevin** (continued).

But in the absence of demurrer, such complaint will sustain evidence of the *situs* of the property at the time the action was commenced: *Id.*

Where the answer admits a joint taking and detention by the defendants, it is not error to refuse to instruct that no case has been established against one of them: *Id.*

Error in date in instruction held immaterial; where the plaintiff owned the property a few days before commencement of action, presumption is that he owned it at that date: *Id.*

Replevin bond is for the especial purpose of indemnifying the obligee or his assignee, against the damages adjudged in the trial in the particular suit in which it is given: *Boyer v. Fowler*, 1 W. T. 101.

The old rule of trying the issue of damages on replevin bond stated: *Id.*

The suit in which the bond was given having been dismissed, there was no judgment in favor of the obligee, and she is concluded from maintaining action on the bond: *Id.*; *contra*, *Meigs v. Keach*, 1 W. T. 305.

Plaintiff to recover in replevin must have had actual possession or the right of reducing the property to possession, at the time of the unlawful taking: *Sires v. Newton*, 1 W. T. 356.

Venue is jurisdictional; complaint must allege the property was in the county at the commencement of the action: *Stiles v. James*, 2 W. T. 194.

But where the sheriff's return on file in the cause shows the property is within the court's jurisdiction, the omission in the pleading is corrected: *Id.*

**Representations.** See Fraud and Deceit; Insurance.

**Reputation.** See Evidence.

**Res Gestæ.** See Evidence.

**Residence.** See Domicile; Elections; Public Lands.

**Res Judicata.** See Executions, and Proceedings Supplemental; *Stare Decisis*.

Suit on a bond for a deed is not a bar to suit for specific performance, the parties and property affected being the same, but the subject-matter different: *Knott v. Stephens*, 5 Or. 235.

On issue of former adjudication, where the record shows

**Res Judicata (continued).**

that the pending cause was in issue in the former suit, jurors in such suit cannot testify otherwise: *Underwood v. French*, 6 Or. 66.

A matter cannot be said to have been adjudicated in former action which was not in issue therein: *Hill v. Cooper*, 6 Or. 181.

Not only all questions actually litigated, but all within the issue, are concluded: *Barrett v. Failing*, 8 Or. 152; *Neil v. Tolman*, 12 Or. 289.

Parol evidence is not admissible to show that certain issues were withdrawn, and not litigated in former suit: *Id.*

When County Court makes an order in probate, it is conclusive unless appealed from: *Winkle v. Winkle*, 8 Or. 193.

Judgment in ejectment is conclusive as between the parties as to legal title and right of possession: *Hill v. Cooper*, 8 Or. 254.

Judgment in default has the same effect (by estoppel) as judgment after verdict: *Neil v. Tolman*, 12 Or. 289.

Water rights settled by decree for want of an answer cannot again be litigated between the parties: *Id.*

Where the record shows that the court in the former case did not consider the merits of the case, but dismissed the same without trial or evidence, such judgment is merely a nonsuit, and plea of former adjudication cannot be based thereon: *Hughes v. Walker*, 14 Or. 481.

The matter adjudicated, to be a bar, must be a fact in issue by the pleadings, as distinguished from a fact in controversy: *Glenn v. Savage*, 14 Or. 567.

A question in issue by the pleadings, though withdrawn from the consideration of the jury, cannot be again the subject of suit: *Id.*

A losing party cannot be allowed to try his cause over again in a counter-suit, for the reason that he was not prepared to meet his adversary upon the trial of the first suit: *Kellogg v. Maddocks*, 2 W. T. 407.

**Restraint of Trade.** See *Contracts*.

**Resulting Trusts.** See *Trusts and Trustees*.

**Return.** See *Appeal and Error*; *Habeas Corpus*; *Summons*.

**Revenue.** See *Taxation*.

**Review, Bills of.** See Equity.

**Review, Writ of.**

*Certiorari* and appeal are concurrent remedies from Justice and County Courts: *Blanchard v. Bennett*, 1 Or. 328; *Schirott v. Phillippi*, 3 Or. 484; *contra*, *Evans v. Christian*, 4 Or. 375; *Sellers v. Corvallis*, 5 Or. 273; *Ramsey v. Pettengill*, 14 Or. 207; *Summers v. Harrington*, 14 Or. 480.

Reasonable time will be allowed by the Circuit Court to bring up proceeding by *certiorari*: *Thompson v. Multnomah Co.*, 2 Or. 34.

Lies to County Court to bring up its proceedings in laying out highway: *Id.*; *C. & G. Road Co. v. Douglas County*, 5 Or. 280.

Lies to review judicial, and not ministerial, acts: *Id.*; *Burnett v. Douglas County*, 4 Or. 388.

Lies to review decisions of assessor and clerk as a board of equalization: *Rhea v. Umatilla County*, 2 Or. 298; *Poppleton v. Yamhill County*, 8 Or. 337.

But must be exercised within six months after their refusal to reduce the complainants' tax: *Id.*

Review allowed as auxiliary to *habeas corpus*; practice: *Fleming v. Bills*, 3 Or. 286.

Appeal involves trial of fact and law; review questions of law only: *Schirott v. Phillippi*, 3 Or. 484.

After expiration of time to appeal, right to review survives: *Id.*; *Evans v. Christian*, 4 Or. 375; *Sellers v. Corvallis*, 5 Or. 273; *contra*, *Ramsey v. Pettengill*, 14 Or. 207; *Summers v. Harrington*, 14 Or. 480.

And overruled so far as it applies to County Court: *Broback v. Huff*, 11 Or. 395.

Return to writ is part of the judgment roll, and a bill of exceptions containing same unnecessary: *Johns v. Marion Co.*, 4 Or. 46.

Return must show affirmatively that jurisdiction was acquired: *Id.*

Jurisdictional irregularities cannot be disregarded as not affecting a substantial right: *Id.*

Where the granting of the writ involves matter of public interest it is discretionary: *Burnett v. Douglas County*, 4 Or. 388.

Order of County Court to proper officers to receive and

**Review, Writ of** (continued).

cancel certain warrants is not judicial or subject to review: *Id.*

Review brings up the record, not the evidence: *C. & G. Road Co. v. Douglas County*, 5 Or. 280; *Road Co. v. Douglas County*, 6 Or. 299; *Poppleton v. Yamhill County*, 8 Or. 337.

Lies only when the party seeking the writ has been concluded by the determination: *Id.*

Proper remedy to require County Court to complete its record, and not injunction: *Road Co. v. Douglas County*, 5 Or. 373.

When and in what manner the facts may be brought up to the court for review; what is the record? *Road Co. v. Douglas County*, 5 Or. 406; *Harper v. Harding*, 3 Or. 361.

Affidavits in support of application for *nunc pro tunc* order, part of record: *Id.*

Only remedy from justice's judgment after striking out answer, defendant refusing to further plead: *Long v. Sharp*, 5 Or. 438.

Does not lie to County Court for exercise of discretion in fixing and allowing reasonable fees for services, where not fixed by law: *Cook v. Multnomah County*, 8 Or. 170.

But where, in such case, it exercises its jurisdiction erroneously, or exceeds its jurisdiction, review lies: *Pruden v. Grant Co.*, 12 Or. 308.

Does not lie to board of school land commissions to review its decisions: *Corpe v. Brooks*, 8 Or. 222.

Findings of fact of inferior tribunal will not be disturbed unless manifestly wrong: *Poppleton v. Yamhill County*, 8 Or. 337.

Docket of justice not showing that defendant was given an hour to appear, judgment in default reversed on review: *Gaunt v. Perkins*, 8 Or. 354.

Lies to County Court to correct errors of in county business; appeal is not proper remedy: *Mountain v. Multnomah County*, 8 Or. 470.

So review lies to the County Court to review its proceedings where it refuses to perform a duty prescribed by law in auditing, allowing, and paying the expenses of a militia company for its armory: *Id.*



**Review, Writ of** (continued).

Proper remedy from judgment of recorder of La Fayette rendered in city case: *Town of La Fayette v. Clark*, 9 Or. 225.

Common council of Portland being by charter the final judge of the election of its members, on review errors of fact or law in counting the votes cannot be retried: *Simon v. Portland Common Council*, 9 Or. 437.

Does not lie to County Court in the matter of auditing and allowing claims, except where such duties are invested with judicial character: *Crossen v. Wasco Co.*, 10 Or. 111.

Proper judgment in Circuit Court on review of justice's judgment is to direct the justice to proceed in the matter reviewed according to the decision of the Circuit Court: *Crowley v. State*, 11 Or. 512.

Appeal and review are concurrent remedies to review a void judgment in default: *Prickett v. Cleek*, 13 Or. 415.

Where a policeman is ousted without cause by mayor and council, and another is put in his place, *quare* whether review will not lie: *Selby v. Portland*, 14 Or. 243.

County is necessary party defendant in proceedings to review action of county commissioners refusing license to sell liquors: *Wood v. Riddle*, 14 Or. 254.

Review is not a remedy adapted to the litigation of disputed claims against a county: *Vincent v. Umatilla Co.*, 14 Or. 375.

Upon review in such case all the facts and requirements of law to the creation of a valid claim against the county should appear affirmatively: *Id.*

And this rule is more strictly applied where the proceedings in the County Court were *ex parte*: *Id.*

So, the allowance of claims for militia companies being discretionary with the County Court, it must appear that due application and compliance with the law has been made: *Id.*

**Revival of Judgments.** See Judgments and Decrees.

**Rewards.**

Finder of lost property not entitled to reward unless there be promise of reward by owner: *Watts v. Ward*, 1 Or. 86.

Complaint in action to try title to office, and to have officer adjudged disqualified for having offered reward

**Rewards** (continued).

to voters, must show the promise to be to benefit voter: *State v. Church*, 5 Or. 375.

Promise by candidate to pay into county treasury part of his salary is not such offer as to disqualify unless shown to benefit those to whom offered: *Id.*

Knowledge on the part of the defendants of the publication of an offer of reward over their signature, but without their authority, is not sufficient by mere silence, without fraud, to estop them from denying that they offered the reward: *Hugil v. Kinney*, 9 Or. 250.

Printed advertisement of offer of reward by carrier is admissible evidence as an admission of liability for loss of money package: *Bennett v. N. P. Ex. Co.*, 12 Or. 49.

**Right of Way.** See Easements; Eminent Domain.

**Riot.**

What constitutes an unlawful assemblage under the statute: *Newby v. Territory*, 1 Or. 164.

Form and contents of indictment and verdict: *State v. Tom Louey and Loo Wan*, 11 Or. 326.

**Riparian Owners.** See Ferries; Water and Watercourses.

**Roads.** See Highways.

**Road Supervisors.**

Are agents of county; liability of county for their neglect to repair bridges: *McCalla v. Multnomah Co.*, 3 Or. 424; *Heilner v. Union Co.*, 7 Or. 83.

Are sole judges of the necessity for taking road materials from lands near the road for purpose of repairing the road: *Kendall v. Post*, 8 Or. 141.

Equity will not interfere so long as they do not oppress, in the discharge of such duties: *Id.*

The owner must apply to the County Court for recompense for the injury he suffers by reason of road materials having been taken from his land: *Id.*

Cannot maintain suit to enjoin a person illegally collecting and appropriating road taxes: *Pettyjohn v. Parmenter*, 10 Or. 341.

**Robbery.**

In the contemplation of the law, robbery is not completed until the taking and carrying away are ended, where the removal is continuous and uninterrupted: *State v. Brown*, 7 Or. 186.

## Rules of Court.

Rules of the Oregon Supreme Court: 1 Or. 11; 1 Or. 331; 2 Or. 15; 3 Or. 14; 4 Or. viii.; 6 Or. vii.; 9 Or. 35; 12 Or. 533.

Rules of United States District Court for district of Oregon: 1 Or. 373.

After appeal in criminal case, statement of errors relied on must be given on demand: *State v. Ellis*, 3 Or. 497.

Every court has power to establish reasonable rules for conduct of business: *Carney v. Barrett*, 4 Or. 171; *Coyote G. & S. M. Co. v. Ruble*, 9 Or. 121.

Rule requiring instructions requested to be presented in writing before last address of counsel to jury, held reasonable: *Id.*

Rules promulgated, not repugnant to law, are equally binding on court and litigants: *Coyote G. & S. M. Co. v. Ruble*, 9 Or. 121.

Court has no discretion to set aside a rule in a particular case, unless authorized by the rule itself: *Id.*

Petition for rehearing filed after time fixed by rule cannot be heard: *Id.*

Conceding that Supreme Court of Washington Territory has power to make rules governing it on appeals in admiralty cases, it has not done so, nor has the Supreme Court of the United States made such rules for it: *Nickels v. Griffin*, 1 W. T. 374.

Manner of taking appeal was, under Code of 1871, prescribed by the rules of the territorial Supreme Court: *Garrison v. Cheeney*, 1 W. T. 489.

These rules and the practice thereunder was changed by the Code of 1873: *Id.*

Under Code of 1871, actions at law were regulated by the Code, while all pleadings and proceedings in chancery cases were to be as prescribed by the laws of the United States and the rules of the United States Supreme Court: *Id.*

Publication of summons in equity cases as governed by the rules of the Supreme Court of the United States: *Id.*

Rules of court are part of the record of every cause tried therein, but cannot be considered on appeal, unless properly certified as a part of the record in the cause: *W. W. P. & P. Co. v. Budd*, 2 W. T. 336.

**Rules of Court** (continued).

Whether District Court can, by its rules, make the service on the opposite party, of a demurrer filed with the clerk, essential to an appearance, in view of section 72 of the Code of 1881: *Id.*

Appeal dismissed because brief of appellant was not filed within the time prescribed by rule of the Supreme Court: *Lewis v. Host*, 2 W. T. 402.

**Salary.** See Bribery; Compensation; County Judge; Fees; Offices and Officers; Police Judge; Secretary of State.

**Sales.** See Administrators and Executors; Complaints; Contracts; Damages; Executions, and Proceedings Supplemental; Fraud and Deceit; Liens; Specific Performance; Statute of Frauds; Tender; Trusts and Trustees.

1. THE CONTRACT OF SALE.

2. DELIVERY.

3. VALIDITY.

4. WARRANTY.

5. RIGHTS AND REMEDIES.

1. THE CONTRACT OF SALE.

A contract of sale where title is not to pass until selection is made is not a bill of sale: *Lownsdale v. Hunsaker*, 2 Or. 101.

Mere agreement to sell land does not constitute license to purchaser to enter: *Lee v. Summers*, 2 Or. 260.

Delivery under written agreement to pay rent in installments, until the full price is so paid, and title in the mean time to remain in vendor, is not a sale: *Singer Mfg. Co. v. Graham*, 8 Or. 17; *Rosendorf v. Hirschberg*, 8 Or. 240.

*Bona fide* purchaser from the bailee does not acquire title as against owner: *Id.*

Vendee takes, in such case, merely a right by implication to use until he makes default: *Rosendorf v. Hirschberg*, 8 Or. 240.

An implied condition that the property is in existence is a part of the contract of sale: *Powell v. D. S. & G. P. R. R. Co.*, 12 Or. 488.

If the property has ceased to exist when the time for performance arrives, each party is discharged from the contract: *Id.*

Contract to pass title to a chattel after payment of price



**Sales** (continued).

is regarded as if it read upon such payment: *Hawley, Dodd, & Co. v. Kenoyer*, 1 W. T. 609.

Such contract contains two mutual interdependent promises, the one being in consideration of the other, and conditional upon its performance: *Id.*

**2. DELIVERY.**

Sale unaccompanied by delivery is void at common law against attaching creditors: *Monroe v. Hussey and Burbank*, 1 Or. 188.

Sale without delivery, when a future selection and delivery is contemplated, gives vendee no right to take possession without consent of vendor; his action is for breach of contract: *Lownsdale v. Hunsaker*, 2 Or. 101.

Delivery of sheep under contract; question for the jury, where they were not counted out: *Southwell v. Breezley*, 5 Or. 143; *S. C.*, 5 Or. 458.

The question of fraud on the sale of chattels where vendor retains possession should be left to the jury; the presumption is disputable: *McCully v. Swackhamer*, 6 Or. 438.

Vendor need not remove heavy machinery from his shop to depot, to deliver it, when vendee is not there with cars as agreed, to receive it; *Smith Bros. v. Wheeler*, 7 Or. 49.

Actual delivery is not necessary in such case before action for the price: *Id.*

Sale of standing timber, to be delivered in logs at vendee's mill, the possession and right of property remain in the vendor until delivery: *Dean v. Lawham*, 7 Or. 422.

The pledgee of the vendor, holding possession to secure the price of his labor on the logs, has a right to the possession as against the vendee: *Id.*

Such pledgee is bound to deliver the logs to the vendor, from whom he received them, on the satisfaction of his claim: *Id.*

Sale of land does not pass title to cord wood cut and piled thereon by vendor: *Schmidt v. Vogt*, 8 Or. 344.

If goods are sold by number, weight, or measure, the sale incomplete, and risk is with the vendor until separation: *Hubler v. Gaston and Furry*, 9 Or. 66.

Quantity of oats sold, to be sacked and delivered, but

**Sales (continued).**

which were not separated or identified at the time of sale, remain the property of and at the risk of the vendor: *Id.*

**3. VALIDITY.**

Validity of sale a question for jury, in action against sheriff for not levying on personalty in the possession of debtor, claimed by him to have been sold to a third party: *Moore v. Floyd*, 4 Or. 101.

Sale of personal property of greater value than fifty dollars is void unless the written agreement or memorandum express the consideration: *Corbitt v. Salem Gaslight Co.*, 6 Or. 405.

Fraud invalidating a sale of chattels left in possession of vendor is a question for the jury: *McCully v. Swackhamer*, 6 Or. 438.

The retention of possession of personalty by the vendor after sale creates a disputable presumption of fraud: *Id.*

Where there is no fiduciary relation, it is not usually incumbent on the vendee, on purchasing, to disclose facts within his knowledge of advantage to vendor: *Caples v. Steel*, 7 Or. 491; *Savage v. Savage*, 12 Or. 459.

Vendee need not disclose his knowledge of a mine on land which he purchases, but his willful misstatement will render the sale voidable: *Id.*

Purchase of land by attorney in fact from his distant principal, without disclosing a better offer previously received, will be set aside on repayment of purchase-money: *Savage v. Savage*, 12 Or. 459.

Sale by executor, without authority, may be ratified and rendered valid by the Probate Court, if deemed of advantage to the estate: *Brewster v. Baxter*, 2 W. T. 135.

So any one interested in the estate may ratify the same to the extent of his interest: *Id.*

Demand by such interested person, with knowledge of the facts, made upon the vendee for an accounting of the proceeds of such sale, is a ratification: *Id.*

**4. WARRANTY.**

Price paid is the measure of damages for breach of warranty of title: *Arthur v. Moss*, 1 Or. 193.

Measure of damages for breach of warranty on sale of engine: *Drake v. Sears*, 8 Or. 209.

**Sales (continued).**

Where answer denied express warranty that hops sold were grown by defendants, and averred their soundness at time of delivery, plaintiff must prove sale by sample and inferiority of the bulk to the sample, or fraud, or express warranty of quality: *Schmieg v. Wold*, 1 W. T. 472.

Sale of chattels in possession of vendor is a warranty of title, which extends to encumbrances: *Baker and Hamilton v. McAllister*, 2 W. T. 48.

**5. RIGHTS AND REMEDIES.**

Complaint must allege promise to pay for goods sold, and show that payment is due: *Bowen v. Emmerson*, 3 Or. 452.

Equity will entertain jurisdiction in case of fraudulent sale, where deceit is alleged, although an action for deceit would lie: *Smith v. Griswold*, 6 Or. 440.

Where goods are sold on credit, the vendee to furnish secured notes in payment, and he fails to do so, action lies to recover the price before the term of credit expires: *Wheeler v. Harrah*, 14 Or. 325.

Where contract within the statute of frauds contains two mutual promises, and is signed by the party suing on it only, the other party may successfully interpose the defense of the statute: *Hawley, Dodd, & Co. v. Kenoyer*, 1 W. T. 609.

Vendee, on discovering breach of warranty of title of the chattels, may rescind by tendering back the property, and set up the breach of the contract against an action for the price: *Baker and Hamilton v. McAllister*, 2 W. T. 48.

On breach by vendee of executory contract for sale of real estate, vendor may treat the contract as equitable mortgage and foreclose, or may tender deed and sue for purchase price: *Wood v. Mastick*, 2 W. T. 64.

Vendee of land in possession must tender reconveyance, or offer to surrender possession, or he cannot defend on the ground that vendor had agreed to execute further deed, and had failed in the condition: *Kenworthy v. Merritt*, 2 W. T. 155.

Vendor fraudulently selling lots of little value, at same time showing vendee lots of great value, and by fraud

**Sales (continued).**

pursuading him to believe them the lots sold, is liable in an action of deceit for the difference in value: *Phinney v. Hubbard*, 2 W. T. 369.

**Salmon.** See Game Laws.

**Satisfaction.** See Executions, and Proceedings Supplemental; Judgments and Decrees; Mortgages.

**Schools.** See Public Lands; University.

1. SCHOOL DISTRICTS.

2. SCHOOL TAX AND SCHOOL FUND.

3. OFFICERS.

1. SCHOOL DISTRICTS.

Are public corporations, and consent of governor necessary before suit to annul their existence: *State v. Hulin*, 2 Or. 306.

Claims should be presented to the directors before suing the district thereon: *Stackpole v. School District No. 5*, 9 Or. 508.

In the absence of express statutory provision, mechanic's lien cannot attach to a school building: *Lumbering etc. Co. v. School District*, 13 Or. 283.

2. SCHOOL TAX AND SCHOOL FUND.

Clerk may pay outstanding warrants in the order of their presentation: *Howard v. Bamford*, 3 Or. 565.

Not necessary to apply the money of each year exclusively to pay for school during such year: *Id.*

Remedy when clerk has funds and refuses to pay a claim is by *mandamus*: *Id.*

Compensation of member of the board of commissioners out of school fund under the act of 1864: *Fleischner v. Chadwick*, 5 Or. 152.

Act of 1865, providing for loaning school funds, is constitutional: *Kubli v. Martin*, 5 Or. 436.

Indebtedness may be deducted from assessments for school purposes: *Stephens v. School District No. 21*, 6 Or. 353.

School clerk in making assessments must follow the general law governing assessors: *Id.*

Act of 1876, as to collecting school taxes, repeals subdivision 2, section 37, chapter 4, Miscellaneous Laws: *Stingle v. Nevel*, 9 Or. 62.



**Schools (continued).**

The act of 1878, upon the same subject, does not repeal said act of 1876: *Id.*

**3. OFFICERS.**

Court takes judicial notice of a superintendent's power to convey school land to private person: *Dolph v. Barney*, 5 Or. 192.

His deed, if regular on its face, is *prima facie* evidence of his power to convey: *Id.*

**Scire Facias.** See Judgments and Decrees.

**Seals.**

Of private corporation need be in no particular form: *Eagle Woolen Mills Co. v. Monteith*, 2 Or. 277.

Iowa statute concerning seals of private person to sealed instruments was adopted in 1844 in Oregon: *Wilson v. McEwan*, 7 Or. 87.

Any device or scrawl affixed by way of a seal is sufficient under that statute: *Id.*

Of corporation, with the corporate name thereon, affixed by officers, with their names on a note, imports an intention to bind the company: *Guthrie v. Imbrie*, 12 Or. 182.

Private seal of probate judge adopted as the seal of the court is entitled to full credit as such: *Ward v. Moorey*, 1 W. T. 104.

**Seat of Government.**

Legislature, in enacting that seat of government shall be and remain at Vancouver, exceeded its powers under the Organic Act to "change" the same: *Seat of Government Case*, 1 W. T. 115.

Said act is made contingent by act of same session, submitting to the people a vote as to their choice for place for the seat of government: *Id.*

**Secretary of State.**

Authority to draw warrant depends on appropriation by legislature: *Brown v. Fleischner*, 4 Or. 132.

Decisions of, in allowing claims against the state, are not judicial in their nature or effect: *State v. Brown*, 10 Or. 215.

Such decisions are not conclusive on the parties in collateral proceedings: *Id.*

Allowance of claim by, does not constitute account stated,

**Secretary of State** (continued).

and state is not bound by the determination in action to recover money unlawfully allowed on such account: *Id.*

Acting as governor, during *interim*, is entitled to the salary as such, though drawing salary as secretary: *Chadwick v. Earhart*, 11 Or. 389.

Continues to perform duties of governor until successor is elected, although his office as secretary has expired in the mean time: *Id.*

**Seduction.**

Good character of plaintiff and defendant's family may be shown by the plaintiff: *Parker v. Monteith*, 7 Or. 277.

Evidence of the flight of the defendant when charged with the seduction is admissible: *Id.*

Plaintiff may prove the seduction was accomplished under promise of marriage: *Id.*

Allegation that "one F. P., the daughter of the plaintiff," etc., sufficiently alleges that she is the daughter: *Id.*

So allegation that daughter is sixteen years of age sufficiently alleges that she is under twenty-one: *Lee v. Cooley*, 13 Or. 433.

Letter from plaintiff's daughter to defendant, delivered by the plaintiff, and oral reply then made by defendant, are admissible in behalf of plaintiff on the footing of conversations between the parties: *Id.*

Statute giving woman right of action for her own seduction applies only where both are not equally guilty: *Breon v. Henkle*, 14 Or. 494.

Plaintiff in such case cannot recover unless defendant employed such artifice and deceit as is calculated to mislead a virtuous woman: *Id.*

**Self-defense.** See Criminal Law; Homicide.

**Sentence.** See Criminal Law.

**Separate Estate.** See Husband and Wife.

**Service of Process.** See Appeal and Error; Summons.

**Services.** See Compensation; Lien; Wages.

**Servitudes.** See Easements.

**Set-offs and Counterclaims.** See Divorce; Equity.

Set-off of amount admitted by pleadings in former action: *Kafka v. Simon*, 3 Or. 555.

**Set-offs and Counterclaims (continued).**

Answer in equity held not such pleading of counterclaim as to prevent nonsuit: *Dove v. Hayden*, 5 Or. 500.

Defense in a suit by married woman for equity in land, claiming a trust, held not to be a counterclaim: *Id.*

Counterclaim to a suit in equity must be one upon which defendant might maintain action against plaintiff, and must be connected with subject-matter of suit: *Dove v. Hayden*, 5 Or. 500; *Burrage v. B. G. & Q. M. Co.*, 12 Or. 169.

Counterclaim irregularly pleaded, not demurred to, is sufficient after reply: *Scheland v. Erpelding*, 6 Or. 258.

Recoupment for damages on breach of warranty of engine, in action for the price: *Drake v. Sears*, 8 Or. 209.

Payment on note cannot be pleaded as counterclaim in a suit on the note, but may be proved under general allegation of payment: *Hendrix v. Gore*, 8 Or. 406.

Payment on a mortgage is not a cause of suit which must be pleaded as a counterclaim in a suit to foreclose the mortgage: *Id.*

One liable to a sheriff to indemnify him, or who has indemnified him for an illegal levy, is not entitled to set off a prior judgment against the owner of the property upon the judgment which the latter obtains against the sheriff for the wrongful taking: *Ladd and Bush v. Ferguson and McFadden*, 9 Or. 180.

Right of set-off does not exist against a judgment for costs which has previously been assigned: *Id.*

A legal demand, not liquidated, and not connected with the subject-matter of the suit, cannot be pleaded as a set-off in equity: *Burrage v. B. G. & Q. M. Co.*, 12 Or. 169.

Partial failure of consideration may be set up as a defense to an action on a bill of exchange, and the defendant recoup his damages though unliquidated: *Davis v. Wait*, 12 Or. 425.

A claim in which a stranger to the suit is interested is not a proper subject of set-off: *Williams & Co. v. Miller & Co.*, 1 W. T. 88.

Sale of a contract to furnish supplies to the United States being void, no valid counterclaim can be based thereon: *Turnbull and Jones v. Farnsworth*, 1 W. T. 444.

**Settlements.**

No interest allowed on mutual accounts until after settlement and balance is struck: *Catlin v. Knott*, 2 Or. 321.

Item omitted by mistake from receipt on settlement may be shown by parol: *Williams v. Poppleton*, 3 Or. 139.

Settlement of doubtful claims out of court are favored by the courts: *Wells v. Neff*, 14 Or. 66.

Such settlement will not be set aside for ordinary mistake of law or fact: *Id.*

Party seeking to set same aside should do equity, and restore the property or rights he acquired by the settlement: *Id.*

**Sewers.** See Municipal Corporations.

**Sheriffs.** See Fees; Executions, and Proceedings Supplemental; Taxation.

Service of complaint by deputy in his own name, insufficient: *Dennison v. Story*, 1 Or. 272.

Sheriff cannot reattach property on new claims after accepting redelivery bond: *Duncan v. Thomas*, 1 Or. 314.

County commissioners cannot order sheriff to give new bond, or declare his office vacant on failure to do so: *Ruckles v. State*, 1 Or. 347.

Nor, after approving, of their own motion disapprove his bond, and thus change the vested rights of the parties to the bond: *Wren v. Fargo*, 2 Or. 19.

Requirement to sell known lots and parcels separately is directory: *Griswold v. Stoughton*, 2 Or. 61; *Bank of British Columbia v. Page*, 7 Or. 454.

Powers of incumbent cease when he is served with notice of the election of successor: *Warner v. Myers*, 3 Or. 218; *S. C.*, 4 Or. 72.

Contest of the election does not operate to stay the effect thereof: *Id.*

Emoluments unearned are subject to control of the legislature: *Bird v. Wasco County*, 3 Or. 282.

Sheriff liable with his sureties for failing or refusing to levy: *Moore v. Floyd*, 4 Or. 101; *Habersham v. Sears*, 11 Or. 431.

Rights and special ownership in property attached: *State v. Cornelius*, 5 Or. 46.

Duty to obey writ of execution in due form; receiving money conditionally: *Richards v. Nye*, 5 Or. 382.



**Sheriffs (continued).**

"Sheriff" in section 110 of the Civil Code (sec. 112, Hill's A. L.), relating to arrest in civil cases, includes constables: *Hume v. Norris*, 5 Or. 478.

Can appoint jailer, and is responsible for his acts, and county is not liable for his compensation: *Crossen v. Wasco County*, 6 Or. 215.

Presumed that service was made in the county of the sheriff making the return: *Roy v. Horsley*, 6 Or. 270.

Sheriff may be indicted for converting money collected for taxes: *State v. Dale*, 8 Or. 229.

In such action it may be proved that he was sheriff and collected from individual tax-payers: *Id.*

Money so collected is public money for which he may be punished under section 559 of the Criminal Code (sec. 1772, Hill's A. L.): *Id.*

Verdict of sheriff's jury under section 284 of the Code (sec. 284, Hill's A. L.) operates as a full indemnity to him as against the claimant of goods taken on execution: *Remdall v. Swackhamer*, 8 Or. 502; *Capital Lumbering Co. v. Hall*, 9 Or. 93; *Hexter v. Schneider*, 14 Or. 184.

After verdict against claimant he cannot bring replevin against sheriff for the goods: *Id.*

But such verdict does not prevent action by the owner against a purchaser at the sheriff's sale: *Hexter v. Schneider*, 14 Or. 184.

The proceeding is not judicial, and is not unconstitutional: *Capital Lumbering Co. v. Hall*, 9 Or. 93.

Sheriff may be invested by law with powers and duties not usually belonging to such office: *Lane v. Coos County*, 10 Or. 123.

Sheriff and tax collector not distinct offices: *Id.*

Compensation which sheriff received under the act of 1880 includes his compensation as tax collector, and was all the compensation to which he was entitled: *Id.*

Liability for trespass or to injunction upon garnishing a creditor on defective process: *Ladd and Bush v. Ramsby*, 10 Or. 207.

Conversion by sheriff; plea of justification under a levy must allege that the debtor was the owner of the goods: *Krewson v. Purdom*, 11 Or. 266.

**Sheriffs (continued).**

*Mandamus* does not lie against sheriff to compel him to levy, unless the remedy on his bond is shown to be unavailing: *Id.*

What sufficient complaint in action for failure to pay over money realized on execution: *Schneider v. Sears*, 13 Or. 69.

In case of conflicting levies, sheriff must not decide that his levy is subordinate, but must apply to the court, or must take indemnity bond before releasing: *Id.*

Sheriff is entitled to keeper's fees while in custody of attached property, which are to be taken out of the assets, and not charged as costs in the action: *Id.*

Duty of a sheriff, on receiving writ of attachment, to levy at once upon sufficient property of defendant to satisfy the claim, and costs and expenses: *Gerdes v. Sears*, 13 Or. 358.

When that is done, the writ is fully executed, and he must return it at once: *Id.*

It is unnecessary to hold the writ to keep control of the property: *Id.*

It is imperative upon sheriff to remit tax improperly assessed, upon presentation to him of affidavit, and list of property liable to taxation by the tax-payer: *Smith v. King*, 14 Or. 10.

Has no power to inquire into the truth of such affidavit, or to resort to other evidence, but must strictly follow the statute: *Id.*

*Mandamus* is proper remedy to compel sheriff who refuses in such case to remit tax improperly assessed: *Id.*

Verdict of sheriff's jury upon trial of title to property taken on execution, protects sheriff, but does not prevent claimant from bringing replevin against purchaser: *Hexter v. Schneider*, 14 Or. 184.

Not entitled to commission on sale on execution where judgment creditor bids in the property, and no money passes into sheriff's hands: *Coleman v. Ross*, 14 Or. 349.

And in such case sheriff cannot compel the purchaser to pay in money for his bid: *Id.*

May be compelled to amend defective return, but the court has no power to compel him to alter a return

**Sheriffs** (continued).

regular on its face: *Washington Mill Co. v. Kinnear*, 1 W. T. 99.

If sheriff make false return, party injured has his action against him for damage: *Id.*

The record showing process was served by coroner, it is presumed that sheriff was at the time laboring under disability that made it incumbent on coroner to act in his stead: *Rodolph v. Mayer*, 1 W. T. 133.

Duty of sheriff, where the decree provides for it, if the debt is unsatisfied by sale of mortgaged property on foreclosure, to proceed at once under copy of order of sale to levy on and sell other property of debtor: *Hays v. Miller*, 1 W. T. 143.

**Ships.** See Admiralty; Boats and Vessels; Liens.

**Sidewalks.** See Highways; Municipal Corporations.

**Slander and Libel.**

Use of words "conversations," "discourses," "publish," and "declare," sufficient averment of publicity: *Hurd v. Moore*, 2 Or. 85.

Former rule in slander, that words should be innocently construed, if possible, is now changed so that the words are taken to mean what is generally understood thereby: *Id.*

Slanderous words charging heinous crime, actionable *per se*: *Shartle v. Hutchinson*, 3 Or. 337; *Quigley v. McKee*, 12 Or. 22.

Truth is a defense; but if not proved, the repeating the charge in the answer is an aggravation of damages: *Id.*

Manner and acts of defendant, at time of speaking the words, may be considered by the jury to explain the words, and on the question of malice and damages: *Leverich v. Frank*, 6 Or. 212.

Time alleged in the complaint need not be strictly proved; proof that the words were spoken at any time before the time alleged is sufficient: *Quigley v. McKee*, 12 Or. 22.

What words are actionable *per se*; for such words nominal damages, at least, are recoverable: *Id.*

**Societies.** See Voluntary Associations.

**Soldiers.** See Militia; Offices and Officers.

**Solicitors.** See Attorneys.

**Sovereignty.** See Constitutional Law; Eminent Domain; Taxation.

**Special Verdict.** See Jury and Jury Trial.

**Specific Performance.**

When the rights of the heirs of deceased obligee and surviving obligee, under a bond for a deed, are doubtful, specific performance by the obligor will not be ordered until such rights are settled: *Knott v. Stephens*, 3 Or. 260.

Where all the parties are not before the court, decree not granted unless the interest of each can be ascertained in the suit: *Id.*

No attempt having been made to pay purchase price, and property having greatly increased in value, relief refused: *Id.*

Not granted against a married woman on contract to convey her land made by her and her husband during coverture: *Frarey v. Wheeler*, 4 Or. 190.

But value of improvements erected by party let into possession under the contract is a charge on the land: *Id.*

Contract must be certain and definite and fully proved: *Odell v. Morin*, 5 Or. 96; *Brown v. Lord*, 7 Or. 302; *Wagonblast v. Whitney*, 12 Or. 83.

This rule is applied more strictly against assignees and representatives of contracting parties: *Id.*

Agreement must be fair and just, mutual, and certain in its terms: *Whiteaker v. Vanschoiack*, 5 Or. 113; *Wagonblast v. Whitney*, 12 Or. 83.

Where terms have been varied by parol, courts will not ordinarily decree specific performance: *Id.*

Suit is not barred by a judgment in a former action on bond for a deed, where the parties and the property affected are the same, but the plaintiff has since acquired a new interest in the bond: *Knott v. Stephens*, 5 Or. 235.

Relief discretionary and dependent upon the equitable circumstances: *Snider v. Lehnherr*, 5 Or. 385.

May be granted to party in possession under imperfect deed; in such case, deed is construed as a contract to convey: *Hill v. Cooper*, 6 Or. 181.

Possession, relied on as part performance, when contract was not in writing, must be visible and exclusive, and taken under the contract: *Brown v. Lord*, 7 Or. 302.



**Specific Performance** (continued).

Improvements erected by son on father's land no evidence of gift of the land: *Id.*

The boundaries of the land must be clearly defined in the contract to warrant relief: *Id.*

Contract to support, in consideration of land conveyed, will be enforced in equity, and the land charged with such support: *Watson v. Smith*, 7 Or. 448.

Parol promise, without consideration, for future leasing for years gives promisee no rights to specific performance, though without request he goes into possession: *Pulse v. Hamer*, 8 Or. 251.

Possession under an agreement to convey in which description was defective, held sufficient to identify the land: *Richards v. Snider*, 11 Or. 197.

In a proper case, it is as much a matter of course for equity to grant specific performance as for a court of law to give damages: *Richards v. Snyder*, 11 Or. 501.

When time is not of the essence of the contract, mere lapse of time without laches does not bar relief: *Id.*

To take a parol contract out of the statute of frauds, the evidence must show the quantity of land, define its boundaries, and fix the consideration: *Wagonblast v. Whitney*, 12 Or. 83.

Vendor may have remedy against vendee to enforce payment of purchase price: *Sanford v. Wheelan*, 12 Or. 301.

But under a covenant to convey free of encumbrances, vendor cannot have specific performance until he removes or deducts for existing liens: *Id.*

Defendant may plead in his answer a contract different from the one stated in complaint: *Thompson v. Hawley*, 14 Or. 199.

In such case if the court finds the contract pleaded in the answer to be the true contract, defendant is entitled to a decree in accordance therewith: *Id.*

Where it appears that the contract to convey was not to convey by a good and sufficient deed, but simply to convey whatever title vendor had, that is all vendee can insist upon: *Id.*

**Spirituuous Liquors.** See Liquor Laws.

**Stake-holders.** See Wagers.

**Stare Decisis.** See Law of the Case.

*Stare decisis* is the policy of the courts, and the doctrine should not be departed from except when the former case has been decided contrary to principle: *State v. Clark*, 9 Or. 466; *Multnomah County v. Sliker*, 10 Or. 65; *Despain v. Crow*, 14 Or. 404.

The principle is particularly applicable where court has declared the constitutionality of a statute and is called upon to pass upon the question again: *Multnomah County v. Sliker*, 10 Or. 65.

Case criticised but followed on the principle of *stare decisis*: *Corvallis v. Stock*, 12 Or. 391; *Sheridan v. Salem*, 14 Or. 328.

Former adjudication should not be disturbed except for weighty reasons: *Chat Walts v. Territory*, 1 W. T. 409.

**State.** See Taxation.

The immunity of the state as a party defendant extends only to its being a party of record: *Dunn v. State University*, 9 Or. 357.

Such immunity does not extend to its agents, who hold the title and possession of real property, in a suit concerning the same: *Id.*

Private parties cannot use the name of the state to try private controversy by *quo warranto*: *Wilson and Wakeman v. Shively*, 10 Or. 267.

State is proper party to bring suit for an accounting against persons having charge of funds arising from the sale of school lands: *State v. Chadwick and Brown*, 10 Or. 423.

"States," as used in the act of Congress of 1837, regarding pilotage, includes "territories": *Edwards v. Steamship Panama*, 1 Or. 418; *Neil v. Wilson*, 14 Or. 410.

**State Treasurer.** See Treasurer of State.**State University.** See University.**Statute of Frauds.**

Contract to convey land may be abandoned by parol: *Guthrie v. Thompson*, 1 Or. 353.

Unless contract is necessarily incapable of performance within a year, not within statute: *Hedges v. Strong*, 3 Or. 18; *Southwell v. Breezley*, 5 Or. 143; *S. C.*, 5 Or. 458.

Not necessary to allege in complaint that the promise was in writing: *Id.*: *Albee v. Albee*, 3 Or. 321.

**Statute of Frauds (continued).**

If promise to pay debt of another arises out of new consideration between the new parties, it is not within statute: *Id.*; *Ludwick v. Watson*, 3 Or. 256.

Not necessary to allege, in pleading, that the agreement for sale of land was written: *Albee v. Albee*, 3 Or. 321.

In case of collateral undertaking, under the statute, the plaintiff should declare specially: *Hayden v. Steadman*, 3 Or. 550.

Verbal lease for two years cannot be proved to establish lease for one year, good under the statute: *Noyes v. Stauff*, 5 Or. 455.

Partnership agreement, relating in part to lands, is not void in equity, though not in writing, and may be proved by parol: *Knott v. Knott*, 6 Or. 142.

Agreement for the sale of personalty of more than fifty dollars value must be written, and express the consideration, and be subscribed by the party to be charged: *Corbitt v. Salem Gaslight Co.*, 6 Or. 405.

Possession of land, relied on as part of performance, to take the contract out of the statute, must be visible and notorious, and taken under the contract: *Brown v. Lord*, 7 Or. 302.

Person going into possession without request, on parol promise of a future written lease for years, gains no right as against the owner: *Pulse v. Hamer*, 8 Or. 251.

Where persons own land through which a stream flows, and by parol agree upon its division and appropriation, and partly perform the agreement, equity will enforce: *Coffman v. Robbins*, 8 Or. 278.

Parol proof to establish a resulting trust in land is admissible, but not to prove agreement to sell the interest of a *cestui que trust*: *Chenoweth and Johnson v. Lewis*, 9 Or. 150.

Parol agreement to sell an equitable interest in land is void: *Id.*

Part performance, to take the case out of the statute, must be of the identical contract alleged, which must be certain and definite, and proved as alleged: *Plymale v. Comstock*, 9 Or. 318.

When parol agreements between adjoining owners respecting boundary are within the statute: *Lennox v. Hendricks*, 11 Or. 33.

**Statute of Frands (continued).**

Parol agreement to purchase land with purchaser's own money, and to hold same in trust for a third party, is void: *Kelly v. Ruble*, 11 Or. 75.

To take parol contract to convey land out of the statute, its terms must be certain, and the boundaries and consideration fully proved: *Wagonblast v. Whitney*, 12 Or. 83.

Contract for sale of land contained in letters between the parties being uncertain, parol evidence of former understanding of the parties admissible in construing: *Fisk v. Henarie*, 13 Or. 156.

Parol evidence of contract for sale of land is admissible to be followed by proof of a subsequent written recognition by party to be charged: *Id.*

Agreement by a vendor of land to pay a balance of purchase-money to a stranger to the contract is not within the statute: *Strong v. Kamm*, 13 Or. 172.

Where a contract contains two mutual promises, and is signed only by the party suing upon it, the other party may successfully interpose the defense of the statute: *Hawley, Dodd, & Co. v. Kenoyer*, 1 W. T. 609.

Contract held not to be a sale, and not within the statute: *P. S. I. Co. v. Worthington*, 2 W. T. 472.

**Statute of Limitations.** See Adverse Possession.

On substitution of new term of limitation by a new law, time elapsed under old law is to be computed: *McLaughlin v. Hoover*, 1 Or. 131.

When the cause of action is barred, repeal of the statute does not destroy the bar: *Baldro v. Tolmie*, 1 Or. 176.

Pleading that the action did not accrue within six years is sufficient, though the statutory limitation is five years, since the latter is included in the period pleaded: *Id.*

The statute must be pleaded, or cannot be taken advantage of on error: *Steamer Senorita v. Simonds*, 1 Or. 274.

Where there is no presentment of claim against estate within statutory period therefor, claim is barred: *Zachary v. Chambers*, 1 Or. 321.

Claim against the state, presented to legislature and not paid, and afterwards sued on under a statute enacted to provide for a right of action against the state, is not



**Statute of Limitations** (continued).

barred, though six years have elapsed since presentation to the legislature, there being no laches, and the plaintiff suing within a reasonable time after the statute gave him a remedy: *Ketchum v. State*, 2 Or. 103.

Domestic judgment is not within statute of limitations, and may be kept alive until paid: *Murch v. Moore*, 2 Or. 189; *Strong v. Barnhart*, 5 Or. 496.

The statute begins to run from the time a payment is last made on bill or note: *State v. Hulin*, 2 Or. 307; *Sutherland v. Roberts*, 4 Or. 378; *Creighton v. Vincent*, 10 Or. 56.

Payment of interest or principal of collections by attorney prevents statute running against client for collections retained by attorney: *Torrence v. Strong*, 4 Or. 39.

Absence of mortgagor from state does not prevent statute from running against rights to foreclose: *Anderson v. Baxter*, 4 Or. 105.

Statute goes to the remedy by action or suit: *Id.*

Equity acts by analogy to the law concerning limitations: *Id.*

A suit for foreclosure is a suit *in rem*, and the statute of limitations does not apply to such a proceeding in equity, there being no analogy to actions at law: *Id.*

Mortgagee in possession occupies no more favorable position than if out: *Id.*

Payment by operation of law without request of debtor does not prevent statute from running: *Id.*

Foreclosure suit is not a suit to determine interest in real property within section 378 of the Code (sec. 382, Hill's A. L.), and is not governed by statute of limitations regarding such suits: *Id.*

Payment by administrator of deceased joint debtor prevents statute running against survivor: *Sutherland v. Roberts*: 4 Or. 378.

Under section 25 of the Code, part payment is the test whether suit is barred, and if not barred, suit may be founded on the original promise: *Id.*

Any person who could be compelled to pay may make such payment: *Id.*

Amendment limiting period to less time for bringing suit applies only to causes accruing subsequently: *Pitman v. Bump*, 5 Or. 17.

**Statute of Limitations (continued).**

Mortgage may be foreclosed after the notes are barred:

Myer v. Beal, 5 Or. 130; Gray v. Holland, 9 Or. 512.

Statute does not extinguish the debt, but simply suspends the remedy: *Id.*; Goodwin v. Morris, 9 Or. 322; but see Parker v. Metzger, 12 Or. 407.

Suit on official undertaking is not an action for the recovery of a penalty or forfeiture within subdivision 2 of section 7 of the Code (sec. 7, Hill's A. L.): Howe v. Taylor, 6 Or. 284.

Statute begins to run against debt created in another state, by person subsequently removing to Oregon, when created, and not when he arrives in Oregon: McCormick v. Blanchard, 7 Or. 232.

Answer pleading statute of another state in bar must allege that the cause of action arose in that state, and was between non-residents of this state: Crawford v. Roberts, 8 Or. 324.

Loss of a judgment roll will not be ground for the interference of a court of equity to prevent statute running on an action of ejectment founded thereon, when the roll was found before the time expired: Farris v. Hayes, 9 Or. 81.

The statute affects the remedy only, and not the right or title to personal property: Goodwin v. Morris, 9 Or. 322.

In the absence of allegation and proof to the contrary, common-law rule of limitations presumed to prevail in another state: *Id.*

Payment of part of debt, with the understanding that such payment is to be applied thereon, revives action barred: Creighton v. Vincent, 10 Or. 56.

Section 25 of the Code (sec. 25, Hill's A. L.) refers only to payments made on contracts before the statute has run against them, and fixes by such payment a new date from which the limitation of action thereon begins to run *de novo*: *Id.*

In trover, statute begins to run at time of the conversion, and action must begin within six years thereafter: Sheppard v. Yocum and De Lashmutt, 10 Or. 402.

"Right of suit" for divorce, within the meaning of section 494 of the Code, does not exist, when the marriage was

**Statute of Limitations** (continued).

- not solemnized in the state, until the party has been a resident for a year: *Jacobsen v. Jacobsen*, 11 Or. 454.
- Limitation of actions between donation claimants under section 378, Civil Code, as amended, applies only to rival claimants to same tract as patentees: *Baker v. Woodward*, 12 Or. 3.
- Adverse possession of realty for the statutory period does not simply bar the remedy of the owner, but creates a title in the possessor as effectual as a written title: *Parker v. Metzger*, 12 Or. 407.
- Amendment of 1878 (sec. 4, Hill's A. L.), limiting period for beginning actions concerning realty from twenty to ten years, gives a year after act takes effect in which to bring certain actions: *Johnson v. Knott*, 13 Or. 308.
- Demurrer on the ground that the statute has run does not lie until the full statutory period has elapsed, though in equity the delay for less time may be considered in granting relief: *Powell v. Dayton etc. R. R. Co.*, 13 Or. 446.
- Mother of infant, with whom he lives, cannot gain title to infant's land, which they occupy as family residence, by lapse of time under the statute of limitations: *Lawrence v. Lawrence*, 14 Or. 77.
- Occupation of one claiming adversely under a writing purporting to be a quit-claim deed of donation claim executed before the expiration of the four years' residence, the same being illegal, cannot ripen into title by statute of limitations: *Bullene v. Garrison*, 1 W. T. 587.
- Complaint, on a note otherwise barred, alleged payments thereon, not directly, but merely inferentially, and was held bad on demurrer: *Yesler v. Oglesbee*, 1 W. T. 604.
- In transitory actions, statute of limitations of the forum, not of the place where contract was made, governs: *Adams v. Kelly*, 1 W. T. 263.
- Maker of note given in California, moving to Washington Territory before the statute of California had run, cannot thereafter, in a court of Washington Territory, interpose the California statute: *Id.*
- Allegations of statute of limitations in answer held a negative pregnant, which plaintiff need not deny: *Gammon v. Dyke*, 2 W. T. 266.

**Statute of Limitations** (continued).

Payment and acceptance of interest on a note relieves it from the statute: *Koslowski v. Yesler*, 2 W. T. 407.

When it appears on the face of the complaint that the claim is barred, advantage may be taken by demurrer: *Wilt v. Buchtel*, 2 W. T. 417.

Suit to redeem property sold under foreclosure sale is governed by section 33 of the Code, prescribing two years, and not by the provision relating to real actions: *Parker v. Dacres*, 2 W. T. 439.

**Statutes.** See Codes; Constitutional Law; Evidence; Public Lands; Statute of Frauds; Statute of Limitations; and see particular topics.

1. PUBLICATION AND TAKING EFFECT.
  2. VALIDITY.
  3. TITLE AND SUBJECT.
  4. CONSTRUCTION.
  5. LOCAL AND SPECIAL ACTS.
  6. MANDATORY AND DIRECTORY PROVISIONS.
  7. REPEAL.
  8. AMENDMENT.
  9. RIGHTS AND REMEDIES.
1. PUBLICATION AND TAKING EFFECT.

Legislature cannot create an emergency, but may declare that certain existing facts create one, so as to give an act effect from its passage and approval by the governor: *McWhirter v. Brainard*, 5 Or. 426.

Submitting to vote selection of location of county seat merely provides mode of taking effect of the statute, and does not delegate legislative power: *Id.*

Compilers of the General Laws were authorized simply to collect, not to comment on the laws, and the text of the original acts is authoritative: *Springfield Milling Co. v. Lane County*, 5 Or. 265.

In the compilation of 1872, the placing of a section of an act printed in the Miscellaneous Laws, with the Criminal Code, does not change the legal effect of such section: *State v. Gaunt*, 13 Or. 115.

Provisions of a law cannot be incorporated in the Criminal Code without legislation: *Id.*

Bill regularly passed will not be defeated by mutilation of the enacting clause, where this appears to have been



**Statutes (continued).**

done without authority of the legislature: *State v. Wright*, 14 Or. 365.

As a general rule, statutes take immediate effect in Washington Territory: *Leschi v. Territory*, 1 W. T. 13.

Act of 1856, regulating territorial courts and requiring judges to assign places for holding courts, took effect when the order was made pursuant to the act: *Boyer v. Fowler*, 1 W. T. 101.

Act locating the seat of government at Vancouver is made contingent by an act of the same session submitting to vote of the people the location thereof: *Seat of Government Case*, 1 W. T. 115.

**2. VALIDITY.**

Provisional government had power to enact binding laws before the territory was organized: *Baldro v. Tolmie*, 1 Or. 176.

The act of the territorial assembly suspending payment of the claim in question held valid: *Young v. Oregon*, 1 Or. 213.

The act of 1868 (c. 39, tit. 1, Hill's A. L.), relating to ditches, is not unconstitutional as taking property for private use: *Seely v. Sebastian*, 4 Or. 25.

Appendix to Criminal Code is a part thereof, and the forms there given are sufficient: *State v. Dodson*, 4 Or. 64.

Where some provisions are void as unconstitutional, other distinct provisions are not necessarily invalid: *State v. Wiley*, 4 Or. 184; *Fleischner v. Chadwick*, 5 Or. 152.

Every intendment is in favor of the validity of an act of the legislature: *Cline and Newsome v. Greenwood and Smith*, 10 Or. 230; *Cresap v. Gray*, 10 Or. 345; *Crowley v. State*, 11 Or. 512.

The mortgage tax law is not invalid: *Mumford v. Sewall*, 11 Or. 67; *Crawford v. Linn County*, 11 Or. 482.

Mortgage tax law does not impair the obligation of contracts: *Mumford v. Sewall*, 11 Or. 67.

*Seem*, the law is not a bill for raising revenue: *Id.*

Original bill on file showing that it was read on three several days, the act is valid though the journal does not show the fact: *Id.*

A statute long recognized as binding should not be de-

**Statutes (continued).**

clared invalid unless unequivocally so: *Crawford v. Beard*, 12 Or. 447.

An act to license sale of liquor is not a bill to raise revenue, and may originate in either house: *State v. Wright*, 14 Or. 365.

Where one branch of the legislature amended an act, and the amendment was improperly stated to the other house, which voted to concur, it seems that the act never became a law: *Id.*

An act without enacting clause and without date is void: *Seat of Government Case*, 1 W. T. 115.

Act providing that seat of government shall be and remain at Vancouver exceeded the power of the legislature under the Organic Act to "change" the seat of government: *Id.*

**5. TITLE AND SUBJECT.**

"An act to change the location of the county seat of Umatilla County" sufficiently expresses the subject-matter, including election, selection, etc.: *Simpson v. Bailey*, 3 Or. 515.

So an act to locate the county seat of Union County: *Moffitt v. Coffin*, 5 Or. 426.

But an act to regulate and tax foreign banking, express, and insurance companies (c. 33, Hill's A. L.) cannot include other corporations of a different character: *Singer M. Co. v. Graham*, 8 Or. 17.

"An act to punish and prevent gambling" (c. 45, Hill's A. L.) expresses but one subject, and is valid though it provide civil and criminal remedies: *O'Keefe v. Weber*, 14 Or. 55.

Act adding certain sections to a city charter is not a revision or amendment, but a supplement, the subject of which is sufficiently disclosed in the title: *David v. Portland Water Company*, 14 Or. 98; *Sheridan v. Salem*, 14 Or. 328.

Title need not specify the object of the act in all its particulars; may state subject generally: *Id.*

An act providing liquor license in towns and cities as well as in counties, held amendatory of certain municipal charters, which subject was not indicated by the title: *State v. Wright*, 14 Or. 365.

**Statutes (continued).**

Act relative to Skamania County, statutes 1865, page 44, is void because the object of the act is not expressed in the title: *Clarke v. Brazee*, 1 W. T. 199.

**4. CONSTRUCTION.**

A body of acts are construed as one, if *in pari materia*, and not conflicting: *McLaughlin v. Hoover*, 1 Or. 31; *Davidson v. Carson*, 1 W. T. 307.

Criminal statutes are to be strictly construed: *Horner v. State*, 1 Or. 267; *Remington v. State*, 1 Or. 281.

Requirements, imperative in language, cannot be controlled by any general provisions: *Zachary v. Chambers*, 1 Or. 321.

It is proper to look into the circumstances and necessities of an enactment to effectuate the intent: *Keith v. Quinney*, 1 Or. 364; *Smith v. Smith*, 3 Or. 363.

Duty devolves on courts to determine what laws of the United States are "applicable" to Oregon Territory under the Organic Act: *United States v. Tom*, 1 Or. 26; *Lownsdale v. Portland*, 1 Id. 382.

Construction given by the executive department of the United States is not binding on courts: *Id.*

Statute of limited application must be confined to subjects to which it is expressly applicable: *Whiteaker v. Haley*, 2 Or. 128.

Statute repealing remedy will not be construed to effect pending actions or suits: *Newsom v. Greenwood*, 4 Or. 119.

Court may determine, from the import of language used, the intention of legislature: *Ankeny v. Multnomah County*, 4 Or. 271.

Effect should be given to all of the words: *Rugh v. Ottenheimer*, 6 Or. 231; *Taylor v. Umatilla County*, 6 Or. 401.

Words of limitation, when unequivocal, will prevail to limit the general language: *Taylor v. Umatilla County*, 6 Or. 401.

When a statute of another state is adopted in Oregon, the decisions of that state are authority for its construction: *Gerrish v. Gerrish*, 8 Or. 351; *McIntyre v. Kamm*, 12 Or. 233; *Trabant v. Rummell*, 14 Or. 17.

Statutes which give costs must be construed strictly: *Jackson v. Siglin*, 10 Or. 92.

**Statutes (continued).**

Legal terms used and not defined in a statute are given their accepted legal definition: *Crawford v. Linn County*, 11 Or. 482.

Title of an ordinance may be resorted to in determining the intention of city council: *Portland v. Schmidt*, 13 Or. 17.

Statute giving cumulative damages to party aggrieved is remedial, not a criminal or a penal statute, and the action for the recovery is a civil action: *O'Keefe v. Weber*, 14 Or. 55.

Preamble and title may be resorted to, to aid in construing: *Seat of Government Case*, 1 W. T. 115.

Statute in derogation of the common law must be strictly construed: *Hays v. Miller*, 1 W. T. 143

Must be construed with reference to all its parts, and if practicable, in a way that the whole may stand: *Davidson v. Carson*, 1 W. T. 307.

Court will give statutes retrospective effect, if such be the obvious intent; the legislature, notwithstanding such construction, may modify remedies and give advantages to a party he did not before possess: *Garrison v. Cheeney*, 1 W. T. 489.

The word "month," occurring in a statute, when the contrary is not therein indicated, means a lunar month, as at common law: *Hale v. Furch*, 1 W. T. 517.

The word "assessment," occurring in the Organic Act, is employed in a common and general sense: *Seattle v. Yesler*, 1 W. T. 572.

So long as a sensible construction can be given compatible with the organic law, a statute should not be pronounced invalid: *Coleman v. Yesler*, 1 W. T. 591.

**5. LOCAL AND SPECIAL ACTS.**

What is a local or special act: *Allen v. Hirsch*, 8 Or. 412; *Crawford v. Linn Co.*, 11 Or. 482.

Wagon road act held not in conflict with constitutional prohibition of local or special laws concerning roads: *Id.*

An act to provide for the compensation of sheriffs and clerks in certain counties, held to be a local law regulating practice in courts of justice: *Manning v. Klippel*, 9 Or. 367.



**Statutes (continued).**

Mortgage tax law is not a special law: *Crawford v. Linn Co.*, 11 Or. 482.

Whether a law be public or private (special) is determined by the subject-matter: *Id.*

Game law, extending to but five counties, is not unconstitutional as granting a special privilege: *Hayes v. Territory*, 2 W. T. 286.

**6. MANDATORY AND DIRECTORY PROVISIONS.**

Provisions of statute in reference to authentication of deeds must be strictly complied with: *Knighton v. Smith*, 1 Or. 276.

A statute directing execution sale of realty, consisting of several known parcels, to be in separate parcels, is directory: *Griswold v. Stoughton*, 2 Or. 61; *Dolph v. Barney*, 5 Or. 192; *Bank of British Columbia v. Page*, 7 Or. 454.

Where a statute gives power to public officers to do an act for the public benefit, the power is a duty though the statute is permissive in its terms: *Springfield Milling Co. v. Lane Co.*, 5 Or. 265; *Rankin v. Buckman*, 9 Or. 253.

"May," used in statute prescribing duty of officer, ordinarily implies that the duty is directory, but when the rights of the public or of third persons are affected, "may" means "shall": *Smith v. King*, 14 Or. 10.

Clause in Civil Practice Act of 1854, that court "may" dismiss case on trial if plaintiff fails to prove a case to go to the jury, is not permissive, but is mandatory, and court must dismiss: *Tolmie v. Dean*, 1 W. T. 46.

**7. REPEAL.**

A statute must have repealing clause, or negative words, to repeal, unless repugnant: *McLaughlin v. Hoover*, 1 Or. 31.

Repeal of lien law by new law after lien acquired does not divest lien: *Steamer Gazelle v. Lake*, 1 Or. 119; *Williamette Falls etc. Co. v. Riley*, 1 Or. 183.

Repeal of statute of limitations, after the statute has become a perfect bar to a cause of action, does not destroy the bar: *Baldio v. Tolmie*, 1 Or. 176.

Charter of Salem giving city power to license sale of liquor does not operate to repeal state law upon the subject: *Palmer v. State*, 2 Or. 66.

**Statutes (continued).**

Statutes not expressly repealing others are to be construed if possible to suffer both to be in force: *Id.*; *State v. Benjamin*, 2 Or. 125.

To repeal by implication, subsequent statute must be on same subject, and intended as substitute: *State v. Benjamin*, 2 Or. 125.

Repeal by implication does not conflict with article 4, section 22, of state constitution: *Delay v. Chapman*, 2 Or. 242; *Fleischner v. Chadwick*, 5 Or. 152; *Grant v. Sels*, 5 Or. 243; *Stingle v. Nevel*, 9 Or. 62.

Not necessary to set forth entire act or section, as in the case of amendment, when the legislature seeks to repeal or limit the same to particular counties: *Bird v. Wasco County*, 3 Or. 282.

Statute repealing remedy does not affect pending actions or suits: *Newsom v. Greenwood*, 4 Or. 119.

Subsequent statute repugnant to prior one operates as repeal so far as they conflict: *Fleischner v. Chadwick*, 5 Or. 152; *Hurst v. Hawn*, 5 Or. 275; *Davidson v. Carson*, 1 W. T. 307.

Subsequent statute, not attempting to revise or amend, not unconstitutional because on same subject: *Id.*

Such statute evidently intended as a substitute operates as a repeal of former without express words: *Stingle v. Nevel*, 9 Or. 62.

General statute will not repeal a previous particular statute simply because it contains inconsistent provisions: *State v. Sturgess*, 9 Or. 537; *S. C.*, 10 Or. 58.

Repeal of the sections of an act printed with the Miscellaneous Laws in the compilation of 1872 repeals the penalty clause of the act collocated in the Criminal Code by the compilers: *State v. Gaunt*, 13 Or. 115.

Repeal of an act repeals the penalty, and such penalty cannot be made to apply to the violation of a subsequent law on the subject, unless expressly or by implication provided: *Id.*

Pending prosecutions fall with the repeal of criminal statutes: *Leschi v. Territory*, 1 W. T. 13.

Special act does not repeal general statute nor a general repeal a special, except by express words, or unless directly in conflict: *Corbett v. Territory*, 1 W. T. 431; *Cascade R. R. Co. v. Sohns*, 1 W. T. 557.

**Statutes (continued).****8. AMENDMENT.**

An act repealing certain titles of the General Laws, and substituting a new title published at length, valid: *Noland v. Costello*, 2 Or. 59.

The act revised or amended need not be set out in the revising or amending act: *Portland v. Stock*, 2 Or. 69.

But must be set forth and published in full as amended therein: *Id.*; *Dolan v. Barnard*, 5 Or. 390.

An act which does not revise a previous act, but simply amends a section, need only set forth amended section: *Delay v. Chapman*, 2 Or. 242.

Portions of old law copied into new, without change, are not re-enacted: *Stingle v. Nevel*, 9 Or. 62.

Amendment to charter of Portland adding sections conferring certain powers regarding water supply is not an amendment of a specific section of the charter requiring all contracts to be authorized by ordinance: *David v. Portland Water Co.*, 14 Or. 98.

Adding sections to a charter, conferring new powers, but not altering existing provisions, is not an amendment or revision within article 4, section 22, of the constitution: *Id.*; *Sheridan v. Salem*, 14 Or. 328.

Act providing for liquor license in cities and towns as well as in counties, held in violation of constitution as amendatory of municipal charters without setting forth the act so amended: *State v. Wright*, 14 Or. 365.

**9. RIGHTS AND REMEDIES.**

After repeal of law under which a lien was acquired, proceedings to enforce should conform to new law: *Steamer Gazelle v. Lake*, 1 Or. 119; *Willamette Falls etc. Co. v. Riley*, 1 Or. 183.

A law passed after the death of an intestate, but before distribution of his estate, controls such distribution: *Armstrong v. Armstrong*, 1 Or. 207.

Repeal of statute giving mere remedy does not impair existing rights: *Young v. Territory*, 1 Or. 214.

Interest is recoverable under the old law to date of passage of the new, and thereafter under the new law: *Stark v. Olney*, 3 Or. 88.

Foreign statute relied upon must be pleaded; it is not presumed that the law of another state is like our own: *Balfour v. Davis*, 14 Or. 47.

**Statutes (continued).**

When a law regulating proceedings in suits is amended, proceedings had in pending suits under the old law are valid, and those had after the new law takes effect should conform thereto: *Marks & Co. v. Crow*, 14 Or. 382; *Garrison v. Cheeney*, 1 W. T. 489.

Pending prosecutions fall with repeal of criminal statutes: *Leschi v. Territory*, 1 W. T. 13.

When a penal statute is repealed without a saving provision, judgment rendered under it must be reversed upon writ of error: *Corbett v. Territory*, 1 W. T. 431.

**Summons.** See Practice.

## 1. FORM.

## 2. SERVICE AND RETURN.

## 3. PUBLICATION.

## 1. FORM.

In mechanic's lien case, notice that "the plaintiff will take judgment for a sum specified therein" is sufficient in summons: *Willamette Falls etc. Co. v. Riley*, 1 Or. 183.

Judgment in default on summons to appear "forthwith" is wholly void: *Hunsaker v. Coffin*, 2 Or. 107.

Summons is not a process within section 1166 of the Civil Code (sec. 1198, Hill's A. L.), and need not run in the name of the state: *Bailey v. Williams*, 6 Or. 71.

## 2. SERVICE AND RETURN.

Return of service on a corporation must show that the person served was the proper officer of the corporation, capable of being served under the statute: *Willamette Falls etc. Co. v. Williams*, 1 Or. 112.

Allegations of the complaint showing the person served was such officer cannot cure defect: *Willamette Falls etc. Co. v. Clark*, 1 Or. 113.

Service by deputy sheriff in his own name is insufficient: *Dennison v. Story*, 1 Or. 272.

In divorce suit, under statute, ten days' service sufficient when within the state: *Rochester v. Rochester*, 1 Or. 307.

Service of the complaint and notice before filing the same is good service under statute: *Keith v. Quinney*, 1 Or. 364.

"Residing with the family" in return is sufficient, and



**Summons (continued).**

equivalent to "of the family": Carland v. Heineborg, 2 Or. 75.

When it appears in the return that service was made in Douglas County, sheriff making the return is presumed sheriff of that county: Id.; and see Marooney v. McKay, 3 Or. 372.

Not good service on man and wife, if but one copy of summons and complaint was delivered: Heatherly v. Hadley, 2 Or. 269; Hass v. Sedlak, 9 Or. 462.

Service, by leaving at dwelling, must strictly comply with the statute: Id.; Trullenger v. Todd, 5 Or. 36.

Service must have been intended as such, and defendant must know that service was intended: Id.

Service by city marshal of summons in civil case in city recorder's court, outside of the city, is void: Craig v. Mosier, 2 Or. 323.

Where the precinct and county are mentioned in the summons, the return signed "constable of Couch precinct" is sufficient, without naming the county: Marooney v. McKay, 3 Or. 372.

Copy of complaint certified to by justice is sufficiently certified to authorize its service with the summons: Id.

Admission of service must state the time and place of service: Heatherly v. Hadley and Owen, 4 Or. 1.

Who certified the copies served must be stated in the return: Id.

Proof of service must be made in the court where summons is returnable: Id.

Recital in decree of due service will not aid the return: Id.

Where summons served contained name of wrong court, judgment in default was void: Smith v. Ellendale Mill Co., 4 Or. 70.

Return must show that defendant was not found, before summons was served by leaving a copy at his dwelling: Trullenger v. Todd, 5 Or. 36; Hass v. Sedlak, 9 Or. 462.

On collateral attack, irregular return not affirmatively showing want of jurisdiction is sufficient: Strong v. Barnhart, 6 Or. 93.

After rendering judgment void for defect in service, justice may still issue *alias* summons and proceed to judgment: Knapp v. King, 6 Or. 243.

**Summons (continued).**

Where, in equity suit, service of summons is made on several and copy of complaint on one of the defendants, and the return does not show that the designation was indorsed on complaint by plaintiff, on collateral attack the service is not void: *Ankeny v. Blackiston*, 7 Or. 407.

Service on wife alone, in foreclosure of wife's mortgage, gives no jurisdiction: *Hass v. Sedlak*, 9 Or. 462.

Amendment of return by sheriff cannot affect previously vested rights in a purchaser under the decree: *Id.*

Service on agent of corporation is substituted service, and must show the facts conferring jurisdiction: *Caro Bros. v. O. & C. R. R. Co.*, 10 Or. 510.

Summons may be served by constable in any precinct in his county: *Taylor v. Jenkins*, 11 Or. 274.

Justice has jurisdiction, though summons is served out of his precinct: *Id.*

Service by a "deputy constable," the record not showing the appointment of any such, is void: *Prickett v. Cleek*, 13 Or. 415.

Sheriff may be compelled to perfect a defective return, but court has no power to compel him to alter a return regular on its face: *Washington Mill Co. v. Kinnear*, 1 W. T. 99.

If sheriff make false return, the party injured thereby has his action against him for damages: *Id.*

In case of return regular on its face, claimed to be false, the court has power to stay the proceedings, on a proper showing, and to prevent surprise or injustice: *Id.*

Statute of 1854, allowing coroners in certain cases to serve summons, is still in force: *Rodolph v. Mayer*, 1 W. T. 133.

Record showing service by coroner, court presumes sheriff was under such disabilities within the statute as to permit coroner to act in his stead: *Id.*

**3. PUBLICATION.**

Fact that affidavit for, was made on information and belief only, will be considered on motion to open default: *Smith v. Smith*, 3 Or. 363.

In construing order for publication, affidavit and complaint will be considered: *Knapp v. King*, 6 Or. 243.

**Summons (continued).**

Recitals in decree of due service by publication, where the record shows that sufficient time since the filing of the complaint had not elapsed, give rise to no presumption of jurisdiction: *Northcut v. Lemery*, 8 Or. 316.

Strict compliance with the statute necessary, and record must affirmatively show: *Id.*; *Odell v. Campbell*, 9 Or. 298; *Victor v. Davis*, 11 Or. 447.

On collateral attack, whether defective affidavit can be taken advantage of, *quære*: *Odell v. Campbell*, 9 Or. 298.

On failure to provide in order for publication for mailing copy of summons, and no excuse being set forth therein, the judgment is void: *Id.*

Date of the order for publication must appear in the published summons: *Id.*

Affidavit of printer proving publication should not merely by recital allege that he is such person, but that fact, as well as the publication, must be sworn to: *Id.*

Recitals in decree of due publication, where not affirmatively sustained by the record, avail not: *Id.*

*Quære*, whether editor is competent to prove publication under the statute: *Id.*

Publication not having been for the time specified in the order, and copy not mailed as by the order required, no jurisdiction was gained, and default entered is void: *Montgomery v. Manning*, 1 W. T. 434.

Under Code of 1871, service of process in equity cases might be had by publication, under the provisions of the Code applicable to law cases, where not inconsistent with the federal laws and rules of the United States Supreme Court: *Garrison v. Cheeney*, 1 W. T. 489.

Rules of United States Supreme Court forbade service of personal process in a chancery suit by publication, and therefore such service could not be had in equity cases under the Code of 1871: *Id.*

The requirements of the act of Congress of June, 1872, respecting service of personal process, pointed out: *Id.*

Record in this case fails to show compliance with the act of Congress, which is essentially different from the provisions of the territorial Code: *Id.*

Record showing service by publication must also show

**Summons** (continued).

affirmatively that defendant was duly cited to appear, as required by statute, and has been afforded an opportunity to be heard: *Id.*

The act of Congress of June, 1872, not having specified how proof of service by publication should be made, the court decides it proper to make the showing by affidavit: *Id.*

Master in chancery cannot administer oaths in such cases: *Id.*

**Sunday.** See Liquor Laws.

Note made on Sunday is void under the statute: *Smith v. Case*, 2 Or. 190.

City which has power under charter to enact ordinances "to secure the peace of the city" does not thereby have authority to pass an ordinance requiring the closing of stores on Sunday: *Corvallis v. Carlile*, 10 Or. 139.

**Supreme Court.** See Appeal and Error; Constitutional Law; Jurisdiction; Mandamus; Rules of Court.**Suretyship.** See Appeal and Error.

After judgment, surety cannot be heard to object that appeal bond is not regular: *Cain v. Harden*, 1 Or. 360; *State v. Hays*, 2 Or. 314.

Surety on bail bond not exonerated by continuance of cause to subsequent term: *Waldron v. Harrison*, 2 Or. 87.

The sureties of an executor not liable until executor is adjudged in default in Probate Court: *Hamlin v. Kinney*, 2 Or. 91; *Adams v. Petrain*, 11 Or. 304.

Surety on bail bond cannot object to slight irregularities in the bond when sued thereon: *State v. Hays*, 2 Or. 314.

Sufficiency of sureties on attachment cannot be inquired of on *habeas corpus*: *Norman v. Zieber*, 3 Or. 197.

Surrender of principal in bond given on civil arrest does not release sureties where bond is conditioned to pay the judgment, though such bond is not authorized by statute: *Paddock v. Hume*, 6 Or. 82.

Forbearance or neglect by creditor to sell the property pledged will release the surety when the contract requires diligence in the sale of the property so pledged: *Walker v. Goldsmith*, 7 Or. 161.



**Suretyship (continued).**

Judgment against principal is no bar to action against principal and surety on another note given as collateral security: *McCullough v. Hellman*, 8 Or. 191.

Extension to principal without notice to surety "until after harvest" does not discharge surety, and is void for indefiniteness: *Findley v. Hill*, 8 Or. 247.

Where there is a request by the surety to the creditor, when the debt is due, to sue the principal, and the creditor fails to do so, this does not discharge the surety, though the creditor subsequently becomes insolvent: *Id.*

Married woman mortgaging her separate property for her husband's debt is a surety, and the property will be discharged by anything that will discharge the principal: *Gray v. Holland*, 9 Or. 512.

Mere forbearance or delay of the creditor toward the principal will not discharge the surety: *Id.*

Relinquishment by creditor of collateral security exonerates accommodation surety: *Brown & Co. v. Rathburn*, 10 Or. 158.

Such defense is available in an action at law by the creditor, or his assignee with notice of the facts: *Id.*

Satisfaction of judgment against surety operates as satisfaction of a separate judgment against the principal: *Cox v. Smith and Forward*, 10 Or. 418.

This, though the judgment satisfied is smaller than the judgment against the principal, and though the creditor, in entering satisfaction of the former, expressly reserves "all rights" against the principal on the judgment against him: *Id.*

Surety on one of several debts secured by a mortgage cannot compel mortgagee on foreclosure to apply proceeds *pro rata* on the debts: *Wilson v. Allen and Lewis*, 11 Or. 154.

Surety on note may, as between himself and his principal, show by parol that he is such surety: *Baker and Smith v. Eglin*, 11 Or. 333; *Harmon v. Hale*, 1 W. T. 422.

Right of contribution against co-surety for costs and expenses in defending suit on the debt: *Van Winkle v. Johnson*, 11 Or. 469.

Obligation of surety to contribute does not depend upon whether he was served with summons or not in the suit on the original debt: *Id.*

**Suretyship** (continued).

Surety on replevin bond cannot object to irregularity in proceedings where not jurisdictional, and is liable notwithstanding: *Carlton v. Dixon*, 12 Or. 144.

In a foreclosure suit against defendants jointly liable, a controversy between them as to which is principal and which surety cannot be determined: *Hovenden v. Knott*, 12 Or. 267.

What judgment on appeal should be rendered against sureties when a counter-undertaking has been given: *Ah Lep v. Gong Choy*, 13 Or. 429.

Sureties on a replevin bond are liable for costs, and for interest by way of damages for the breach, when judgment is against the plaintiff, limited, however, to the amount of the penalty in the bond: *Carlton v. Dixon*, 14 Or. 293.

In an action on a bail bond, the journal of the court is evidence against the sureties, to prove the default of the principal: *Clifford v. Marston*, 14 Or. 426.

The leaning of the law being in favor of sureties, their contracts are strictly construed: *Walla Walla Co. v. Ping*, 1 W. T. 339.

When the penal sum in an official bond has not been inserted until after it has been signed by the sureties and passed out of their control, they are not bound: *Id.*

They are not estopped, though such bond was accepted without knowledge of its alteration: *Id.*

Extrinsic evidence is admissible on the part of one of two signers of a note, to show that he signed as surety: *Harmon v. Hale*, 1 W. T. 422.

Such showing may be made in an action at law: *Id.*

Forbearance to sue principal, after request in writing by the surety, as provided by statute, discharges surety: *Id.*

Verbal request by the surety is not sufficient in such case: *Id.*

Fraudulent conduct on the part of the payee that misleads the surety, and prevents his obtaining indemnity, will discharge the surety: *Id.*

**Surgeons.** See Physicians and Surgeons.

**Surveys.** See Boundaries; Deeds; Public Lands.

**Surveyor-general.** See Public Lands.

**Taxation.** See Assessors; Municipal Corporations; Schools.

1. GENERALLY.

2. ASSESSMENTS.

3. EQUALIZATION.

4. SALES; CERTIFICATES AND DEEDS.

5. REDEMPTION.

1. GENERALLY.

A county cannot charge a percentage for collecting state taxes: *Commissioners v. State*, 1 Or. 358.

Rights and powers of a state over domestic taxation under the United States constitution: *Whiteaker v. Haley*, 2 Or. 128.

State may require taxes to be paid in coin, and such is the law in Oregon: *Id.*

Article 1, section 32, state constitution, providing that taxation must be uniform, applies to taxation to defray general expenses only: *King v. Portland*, 2 Or. 146.

Uniformity is secured when taxes are equal and uniform throughout the taxing district: *East Portland v. Multnomah Co.*, 6 Or. 62; *Crawford v. Linn Co.*, 11 Or. 482.

Article 9, section 6, state constitution, does not require a special state tax to pay deficiencies, when the existing tax is sufficient therefor as well as for current expenses: *Burch v. Earhart*, 7 Or. 58.

It is for the legislature to determine the sufficiency of the existing tax therefor: *Id.*

Sheriff and tax collector are not distinct offices; sheriff is not entitled to additional compensation as tax collector: *Lane v. Coos Co.*, 10 Or. 123.

The statute requiring the sheriff to collect the taxes, and to file an additional bond for the faithful performance of such duties, does not create a new office, but simply imposes new duties upon the sheriff: *Id.*

Tax-payer is entitled to sue in equity to prevent illegal disposition of county funds: *Carman v. Woodruff*, 10 Or. 133; *White v. Commissioners*, 13 Or. 317.

State may tax mortgages where recorded, irrespective of residence of owner: *Mumford v. Sewall*, 11 Or. 67.

Law taxing mortgages of non-residents does not impair obligation of contracts: *Id.*

*Seemle*, that such a law is not a bill for raising revenue: *Id.*

**Taxation (continued).**

Injunction will be granted to restrain city from unlawfully increasing valuations on assessment roll: *Dalton v. East Portland*, 11 Or. 426.

Mortgage tax law does not provide for unequal taxation, and is not a special law: *Crawford v. Linn County*, 11 Or. 482.

The power of the legislature over taxation is limited only by the conditions that it shall be equal and uniform, and shall extend alike to all property except that exempt by the constitution: *Id.*

Power of the legislature over taxation cannot be restrained by the courts on principles of policy: *Id.*

Legislature has power to fix the *situs* of personal property for tax purposes: *Id.*

Mortgage tax law does not exempt mortgages on realty situate in more than one county: *Id.*

Collection of a tax will not be enjoined where part is admitted to be legal, and plaintiff has not paid or tendered that part: *Brown v. School District No. 1*, 12 Or. 345.

One compelled to pay an illegal tax may pay under protest, and recover same back by proper proceeding: *Id.*

Power of city to tax abutting property for street improvements must be strictly construed: *Dowell v. Portland*, 13 Or. 248; *Hawthorne v. East Portland*, 13 Or. 271.

It is the duty of the legislature to levy no more state tax than necessary; but its determination of the rate is conclusive: *State v. Multnomah County*, 13 Or. 287.

County cannot deduct from its quota of state tax amounts uncollected because of its assessment roll containing double assessments: *Id.*

State is not entitled to interest upon recovery from a county of a balance of unpaid taxes: *Id.*

Legislature has full power to apportion counties, and their common burdens: *Morrow County v. Hendryx*, 14 Or. 397.

Taxes collected by Umatilla County cannot be required to be paid over to Morrow County, newly created out of Umatilla County, by *mandamus* against the treasurer of the latter county: *Id.*

When two counties are divided, the old county is liable



**Taxation (continued).**

for state tax charged upon the county at the time, and may be compelled to pay the whole thereof: *Gilliam County v. Wasco County*, 14 Or. 525.

Though the legal title to lands is in the United States, the equitable title in an occupant is subject to taxation: *Puget Sound Agricultural Co. v. Pierce County*, 1 W. T. 159.

*Puget Sound Agricultural Company* had an interest in lands in Washington Territory, confirmed by treaty of 1846, subject to taxation, though the lands were not yet surveyed by the government: *Id.*

The territory, in taxing lands, does not attempt to determine in whom the title vests, but leaves such determination to the parties interested: *Id.*

The taxing power is one of the largest of sovereignty, and will not be presumed to have been relinquished: *Id.*

A law levying tax on "real property" embraces every species of title, whether inchoate or complete: *Id.*

**2. ASSESSMENTS.**

For street improvements, see *Municipal Corporations*.

Property coming into city limits, after assessment is made, cannot be assessed by city: *Or. Steam Nav. Co. v. Portland*, 2 Or. 81.

But persons not previously taxed, who commence business after levy of taxes, selling goods not previously assessed in the city, may be assessed: *Id.*

How assessment shall be made by the assessor: *Or. Steam Nav. Co. v. Wasco County*, 2 Or. 206.

Authority of the County Court over the assessment roll: *Id.*; *Darragh v. Bird*, 3 Or. 246.

When the duties of assessor commence: *Rhea v. Umatilla County*, 2 Or. 298.

Possession and control of property by executor are those of owner for purchase of taxation: *Johnson v. Oregon City*, 2 Or. 327; *Johnson v. City Council*, 3 Or. 13.

The *situs* of invisible and intangible personal property taxed is with the owner: *Id.*; *Poppleton v. Yamhill County*, 8 Or. 337.

Notes, etc., under control of executor living in a city are liable to assessment there, though deposited out of city: *Id.*

**Taxation** (continued).

*Situs* of personalty is with resident, rather than with non-resident, co-executor: Johnson v. City Council, 3 Or. 13.

Assessment or statement furnished assessor is not evidence on issue of value: Oregon Cascade R. R. Co. v. Baily, 3 Or. 164.

Note payable at specified place within the state is indebtedness that may be deducted, though the owner is a non-resident: Ankeny v. Multnomah County, 3 Or. 386.

Not so a note in which place of payment is not designated: Ankeny v. Multnomah County, 3 Or. 388.

Indebtedness within the state defined; statute construed: Ankeny v. Multnomah County, 4 Or. 271.

Indebtedness may be deducted from assessments for school purposes: Stephens v. School District No. 21, 6 Or. 353.

Deduction of indebtedness does not render the tax unequal: Wetmore v. Multnomah County, 6 Or. 463.

Notes and mortgages deposited with person out of the county by resident owner, who has so deposited them after borrowing money from such person to escape taxation, are taxable where owner resides: Poppleton v. Yamhill County, 8 Or. 337.

Notes and mortgages are property subject to taxation: *Id.* Assessment of land by number of acres and value, without location or description, is void: Holmes v. School District No. 15, 11 Or. 332.

East Portland charter held to adopt the county assessment roll within the city as the city assessment roll: Dalton v. East Portland, 11 Or. 426.

City council cannot raise the assessments on such roll by a uniform rate per cent: *Id.*

But *semble*, such action does not vitiate the assessment to the proper amount: *Id.*

City charter, requiring street assessment made in the name of the owner or unknown owners, an assessment in the name of a stranger to the title is void: Dowell v. Portland, 13 Or. 248.

City has no power to reassess or to correct void assessment and sale: *Id.*

**Taxation (continued).**

Assessment in the name of B. F. Dowell, when Fannie Dowell is the true owner, is void: *Id.*

So, assessment to "J. C. Hawthorne, Est. of," although J. C. Hawthorne was owner, and is dead: *Hawthorne v. East Portland*, 13 Or. 271.

Effect of provision in city charter that city may take from county clerk certificate of the name of the owner of property, for purpose of assessment: *Id.*

It is imperative upon the sheriff to remit taxes improperly assessed, upon presentation to him of affidavit, and verified list of his taxable property by tax-payer, showing the wrongful assessment: *Smith v. King*, 14 Or. 10.

Sheriff has not authority to inquire into the truth of the showing made, but must follow the statute: *Id.*

Failure of assessor to assess other property liable to taxation in the county does not release one whose property is duly assessed from payment of taxes: *Puget Sound Agricultural Co. v. Pierce County*, 1 W. T. 159.

Though the only tax levied on any lands in the county is upon the lands of one owner, and other real estate is not taxed, he must pay his tax: *Id.*

The law provides for amending assessment rolls in such case, and the remedy, if assessor fails to do his duty in this respect, is to move to have the roll amended: *Id.*

Under the acts of Congress, discrimination is forbidden in assessment of different kinds of property, and all assessments must be according to valuation: *Seattle v. Yesler*, 1 W. T. 571.

Legislative grant of power to city of Seattle is within the restriction of that act: *Id.*

Towns may make taxes for local improvements a lien on the property benefited, to the extent of the valuation, but cannot make it a personal charge against the owner: *Id.*

The word "assessment" in the Organic Act is used in its common and general sense: *Id.*

**3. EQUALIZATION.**

Assessor and clerk alone as a board of equalization may revise the assessment made, and in what respects: *Oregon Steam Nav. Co. v. Wasco County*, 2 Or. 206; *Darragh v. Bird*, 3 Or. 246.

**Taxation** (continued).

Writ of review lies from the decisions of the board of equalization: *Rhea v. Umatilla County*, 2 Or. 293; *Poppleton v. Yamhill County*, 8 Or. 337.

County Court has no power to correct assessment: *Darragh v. Bird*, 3 Or. 246.

Board has power to raise assessment, and add property not found or included by assessor: *Poppleton v. Yamhill County*, 8 Or. 337.

May try question of fraud in tax-payer removing property from county to escape taxation: *Id.*

City council of East Portland has no power to alter the assessments on the roll, except as a board of equalization: *Dalton v. East Portland*, 11 Or. 426.

**4. SALES; CERTIFICATES AND DEEDS.**

The certificate of tax sale does not convey legal title, but is evidence of equitable title: *Dolph v. Barney*, 5 Or. 193.

Party claiming under a certificate must show a strict compliance with statute in all steps: *Id.*

Deed regular on its face, offered as evidence, together with tax records which show it invalid, proves no title: *De Lashmutt v. Sellwood*, 10 Or. 319.

In ejectment, defendant claiming under statute of limitations may give in evidence a tax deed to show color of title with possession, though the description is defective: *Smith v. Shattuck*, 12 Or. 362.

Power of a municipal corporation to sell real property for delinquent assessment strictly construed: *Dowell v. Portland*, 13 Or. 248.

Exercise of such power is not an adjudication, or the exercise of jurisdictional power: *Id.*

After making void assessment and sale, city has no power to refund purchase money and then reassess and sell, and such sale will be enjoined: *Id.*

Purchaser at such void sale buys at his peril, and cannot recover his money: *Id.*

"Minter's Donation, township 1 south, range 2 west, 320 acres," is a sufficient description in tax deed: *Minter v. Durham*, 13 Or. 470.

**5. REDEMPTION.**

Owner of a part of a tract of land may redeem the whole



**Taxation (continued).**

tract; and when the whole premises were sold, it was necessary for him to redeem the whole: *Rich v. Palmer*, 6 Or. 339.

The complaint of one owning an equitable interest, who has redeemed, and seeks to set aside a deed afterward made by the sheriff to the purchaser, need not set out specifically the nature of plaintiff's equitable title: *Id.* Holder of title bonds to donation claim, before patent, has a right to redeem: *Rich v. Palmer*, 7 Or. 133.

No notice of intention to redeem is necessary: *Id.*

The sheriff, and not the holder of the tax sale certificate, is the one to whom the money should be paid: *Id.*

Redemption or payment of taxes by co-tenant in possession inures to benefit of all: *Minter v. Durham*, 13 Or. 470.

And this, though premises were sold to a stranger for taxes, who afterwards assigned certificate of sale to such tenant: *Id.*

Co-tenant redeeming and claiming to hold until reimbursed may be shown to have been receiving all the profits at the time: *Id.*

**Taxation of Costs.** See Costs and Disbursements.

**Tax Deeds.** See Taxation.

**Tax Sales.** See Taxation.

**Tenants in Common.**

A tenant may sue his co-tenant who sells or destroys common goods: *Yamhill Bridge Co. v. Newby*, 1 Or. 173.

One tenant in common may recover whole property from stranger in ejectment: *Dolph v. Barney*, 5 Or. 193.

Possession of one co-tenant is not the possession of all, where the one in possession claims the whole property under color of title: *Farris v. Hayes*, 9 Or. 81.

One owning an undivided half, mortgaging his interest, on partition takes his allotted portion subject to the mortgage lien: *Board S. L. Com. v. Wiley and Davis*, 10 Or. 86.

Corporation may be a joint tenant with individuals in a ferry franchise: *Hackett v. Multnomah R'y Co.*, 12 Or. 124.

The right of a co-tenant to an accounting: *Id.*

Co-tenant in possession, claiming to hold until reimbursed

**Tenants in Common** (continued).

for having redeemed property from tax sale, may be shown to have been at the time receiving all the rents and profits: *Minter v. Durham*, 13 Or. 470.

Payment of taxes by a co-tenant in possession inures to the benefit of all: *Id.*

And this, though property was sold for taxes, and bid in by a stranger who afterwards assigned certificate of tax sale to the co-tenant in possession: *Id.*

Co-tenants cannot join as plaintiffs in ejectment; but misjoinder is waived by answering over: *Id.*

Co-tenants jointly contracting with a broker for the sale of their land are properly joined as defendants in an action for breach of the contract: *Fisk v. Henarie*, 14 Or. 29.

In such case, it is the contract, and not their co-tenancy, that determines their joint or several liability: *Id.*

**Tender.** See Contracts; Costs and Disbursements; Deeds; Fees; Mortgages.

Vendor must tender deed, and vendee must tender price, before action lies in favor of either upon a contract to convey land on payment of the purchase price: *Guthrie v. Thompson*, 1 Or. 353.

Mortgagor seeking to redeem must tender the debt, except where suit is necessary to fix the amount: *Atkinson v. Morrissy*, 3 Or. 332.

Defendant refusing to accept money on the ground that plaintiff had no right to redeem, tender was unnecessary: *Id.*

If the tender is not made before the suit is commenced, it does not carry costs: *Or. Central R. R. Co. v. Wait*, 3 Or. 428.

Mere readiness to pay, without tender and refusal to accept, is insufficient: *Smith v. Foster*, 5 Or. 44; *Powell v. D. S. & G. R. R. Co.*, 12 Or. 488.

Where the purchaser of property agrees to pay therefor on a day certain, in other property at a certain valuation, tender on the day is necessary, or vendor may consider the contract rescinded, and sue for the equivalent of the property in money: *Shattuck v. Smith*, 5 Or. 125.

Offer in writing to pay, if declined, is sufficient tender under the Code: *Bartel v. Lope*, 6 Or. 321.

**Tender (continued).**

Such tender will discharge the lien of a chattel mortgage if made to the mortgagee: *Id.*

Vendor need not remove heavy machinery from his shop to the depot to constitute a tender thereof, when vendee is not there with cars to receive it and pay for it as agreed: *Smith Bros. v. Wheeler*, 7 Or. 49.

Tender coupled with a condition, or by a person unauthorized, may be disregarded: *Weill v. Clark's Estate*, 9 Or. 387.

Tender in writing under the Code, to be a sufficient tender must be coupled with present ability and readiness to pay: *Ladd and Tilton v. Mason*, 10 Or. 308; *Holladay v. Holladay*, 13 Or. 523.

And when suit is brought, money must be paid into court: *Holladay v. Holladay*, 13 Or. 523.

Burden of proof of ability to pay is on the person claiming the advantage of tender: *Ladd and Tilton v. Mason*, 10 Or. 308.

Mortgagee in possession under deed absolute on its face must tender reconveyance before he can sue for the debt: *Wolcott v. Madden*, 10 Or. 370.

Tender and payment into court, in an action to condemn right of way, is an admission of damages to the amount tendered: *O. R. & N. Co. v. Or. Real Estate Co.*, 10 Or. 444.

Tender and payment into court only admits the cause of action to the amount tendered, and does not preclude defense against recovery of any greater sum: *Simpson v. Carson*, 11 Or. 361.

Plaintiff seeking to enjoin collection of a tax, a part of which is recognized by him as legal, must pay or tender the amount admitted, before bringing suit: *Brown v. School District No. 1*, 12 Or. 345.

When covenants are dependent and concurrent, the party alleging the breach must aver a tender of performance on his part at the stipulated time: *Powell v. D. S. & G. R. R. Co.*, 12 Or. 488; *Hawley, Dodd, & Co. v. Kenoyer*, 1 W. T. 609.

Party cannot keep contract open, and long after time has passed make a tender of a deed, and then allege a breach at the time of tender: *Id.*

**Tender (continued).**

Assignor suing his assignees for an accounting must tender the balance due the creditors, or he is not entitled to costs: *Kinney v. Heatley*, 13 Or. 35.

Note payable at a particular place, tender must be made at the time and place, and the payee must deposit or keep the money intact, and pay it into court when sued: *Adams v. Rutherford*, 13 Or. 78.

Vendee of chattels on discovering breach of warranty of title may tender back the property, and set up the breach as defense in action for the purchase price: *Baker and Hamilton v. McAllister*, 2 W. T. 48.

Under an executory contract to purchase land, on failure of vendee to pay as agreed, vendor may tender deed and sue for the purchase price of the land: *Wood v. Mastick*, 2 W. T. 64.

Vendee in possession of land must tender reconveyance before he can defend in action for purchase price on the ground of breach of condition of sale: *Kenworthy v. Merritt*, 2 W. T. 155.

**Terms of Court.**

Legislature may authorize district judge to appoint special term: *O'Kelly v. Territory*, 1 Or. 51.

Sittings of District Court are terms within the meaning of the law: *Gird v. State*, 1 Or. 308.

Times of holding Circuit Court in third, fourth, and fifth districts not changed by act of 1870: *Smith v. Smith*, 3 Or. 363.

Term appointed by Supreme Court by order entered in journal in term time is a regular term within the meaning of statute on appeals: *Moore v. Packwood*, 5 Or. 325.

County Court may appoint special term at which any business may be done: *Kamer v. Clatsop Co.*, 6 Or. 238.

When statute provides for doing certain things at next ensuing term, regular and not special term is meant: *Tompkins v. Clackamas County*, 11 Or. 364.

Term having been irregularly appointed, *nunc pro tunc* order cannot subsequently be made, correcting the defect, to the injury of the rights of parties: *Id.*

After the close of the next term of the District Court, subsequent to the one at which a judgment was rendered,



**Terms of Court** (continued).

the court has no power to grant relief from such judgment: *Hancock v. Stewart*, 1 W. T. 323.

**Terms of Office.** See Offices and Officers.

County judge elected holds for four years after election, except in case of death, removal, or resignation: *State v. Johns*, 3 Or. 533.

The term attaches to the person elected to fill the same: *Id.*

One appointed to fill a vacancy holds until next general election only: *Id.*

Term of circuit judge is six years, but person elected during an unexpired term holds, not six years, but for the remainder of the term: *State v. Ware*, 13 Or. 380.

Legislative assembly and Congress possess the power of lengthening or shortening the terms of officers elected under the laws of the territory: *Davidson v. Carson*, 1 W. T. 307.

Terms of officers elected at general election of 1869 are not changed by act of Congress changing the time for general election to June, 1870: *Id.*

**Territorial Government.** See Constitutional Law.**Territories.** See Constitutional Law; States.**Testimony de Bene Esse.** See Evidence.**Threats.**

Extortion by; the intent, not the effect, the *gravamen* of the offense: *Latshaw v. Territory*, 1 Or. 140.

Evidence of threats by deceased in homicide case: *State v. Dodson*, 4 Or. 64; *State v. Powers*, 10 Or. 145.

Relinquishment of debt obtained from creditor of weak mind by threats is invalid, whether creditor was sane or not: *Parmentier v. Pater*, 13 Or. 121.

Threats to amount to duress need not be such as would compel a person of ordinary firmness; sufficient if they do in fact compel the threatened person: *Id.*

**Timber and Logs.** See Contracts; Liens; Water and Watercourses.

Contract to cut and deliver a quantity of logs, to be scaled and received in certain lots, held severable: *Tenny v. Mulvaney*, 8 Or. 129.

Evidence and instructions under contract to furnish logs: *Id.*; *Tenny v. Mulvaney*, 8 Or. 513; *Tenny and McK. v. M. & B.*, 9 Or. 405.

**Timber and Logs** (continued).

Purchaser of school land from the state, to which he has certificate, but not a deed, is owner of cord-wood cut thereon by him: *Schmidt v. Vogt*, 8 Or. 344.

Such wood cut and piled on the land does not pass with the land to a purchaser of his claim: *Id.*

Mortgagee in possession, with authority to saw the logs into lumber at mortgagor's mill, and apply the proceeds of sale thereof, less expense, to the mortgage debt, should be allowed the expense of repairing the mill: *Friendly v. McCullough*, 9 Or. 109.

Mortgagee's commissions and proceeds from sale as agreed were allowed in absence of fraud: *Id.*

Order to pay certain sum in lumber is not a draft, and the principles of the law merchant do not apply: *Hyland v. Blodgett*, 9 Or. 166.

Measure of damages for breach of contract of sale of standing timber is the difference between the contract and present market price; and the cost of making road to the timber is not an element of the damage: *Mackey v. Olssen*, 12 Or. 429.

Act of the legislature, 1879, providing a method for the scaling of logs, is not within the inhibition of section 1889, Revised Statutes of the United States: *Crawford v. Cockran*, 2 W. T. 117.

Agent who sells logs of principal, and permits the purchasers to scale them, instead of employing the official scaler, is guilty of negligence, and liable to the principal for the loss he suffers by an incorrect measurement: *Id.*

**Time.** See Criminal Law; Slander and Libel.

If the last day for serving notice of appeal falls on Sunday, time is computed to following day: *Carothers v. Wheeler*, 1 Or. 194.

Term in lease held to run from last day of year, where the day and month was left blank: *Huffman v. McDaniel*, 1 Or. 259.

The word "month," occurring in a statute, means lunar month, as at common law, unless otherwise indicated: *Hale v. Finch*, 1 W. T. 517.

**Titles.** See Adverse Possession; Chattel Mortgages; Deeds; Ejectment; Executions, and Proceedings Supplemental;

**Titles (continued).**

Fee-tail; Forcible Entry and Detainer; Sales; Statute of Limitations; Statutes; Taxation; Trade-marks.

**Toll-gates.** See Towns.

**Torts.** See Admiralty; Attachments; Complaints; Conversion; Damages; Joint and Several Liability; Parties; Pleadings.

**Towns.**

Oral evidence is admissible to prove that a place is a town within the statute relating to toll-gates near towns: *Milarkey v. Foster*, 6 Or. 378.

**Town Sites.** See Public Lands.

**Trade-marks.**

"Great I. X. L. Auction Co.," held not to infringe recorded trade-mark "I. X. L., General Merchandise Auction Store": *Lichtenstein v. Mellis*, 8 Or. 464.

"The Northwest News," title of a newspaper, does not *per se* infringe on the title of "The New Northwest": *Duniway Pub. Co. v. Northwest Print. Co.*, 11 Or. 322.

When injunction will issue to restrain infringement: *Id.*

**Trade, Restraint of.** See Contracts.

**Transcript.** See Appeal and Error; Judgments and Decrees; Justice of the Peace.

**Treasurer of State.**

May not pay warrant, unless drawn on some special fund, authorized by legislative appropriation, except for a claim authorized to be paid out of general fund: *Brown v. Fleischner*, 4 Or. 132.

Duty to set aside a fund out of which to pay warrants under centennial commission act: *Simon v. Brown*, 5 Or. 285.

Cannot pay such warrants out of general appropriation act: *Id.*

**Treaties.**

Rights of British subjects in possession in Oregon, under article 3, treaty of 1846: *Cowenia v. Hannah*, 3 Or. 465; *Puget Sound Agricultural Co. v. Pierce Co.*, 1 W. T. 159; *Roberts v. Lucas*, 1 W. T. 205.

The only title acquired during joint occupancy, possessory: *Id.*

Rights reserved to the Puget Sound Agricultural Co., under section 4 of said treaty: *Puget Sound Agricultural*

**Treaties** (continued).

Co. v. Pierce Co., 1 W. T. 159; Roberts v. Lucas, 1 W. T. 205.

Under convention for joint occupancy, pending settlement of boundary between United States and Great Britain, jurisdiction of territorial courts over crimes committed on San Juan Island: Watts v. United States, 1 W. T. 289; Watts v. Territory, 1 W. T. 409.

Said convention was not a treaty within the meaning of the constitution: Id.

**Trespass.** See Animals; Damages; Injunction; Negligence. Common law rule of liability for cattle damage-feasant not applicable to Oregon: Campbell v. Bridwell, 5 Or. 311.

To maintain action for damage by cattle, plaintiff must allege that he kept a fence prescribed by statute: Id.

In operating a flume built under license across grantor's land, defendants in floating wood therein are liable only for actual injury to grantor: Spear v. Cook, 3 Or. 380.

Where equity will relieve by injunction against threatened trespass: Weiss v. Jackson County, 9 Or. 470; Wattier v. Miller, 11 Or. 329; Smith v. Gardner, 12 Or. 221.

In the absence of statute, a person is not obliged to fence against cattle, before he can maintain an action for damage by their trespass: French v. Cresswell, 13 Or. 418.

Statute requiring land-owners to fence against certain kinds of stock, in Umatilla County, does not apply to sheep, which are not enumerated: Id.

Title and possession of settler on public land, who has filed declaration under homestead or timber acts, is sufficient to enable him to maintain action for trespass: Id.

Master liable for act of his herder who permits sheep to trespass, though done in disobedience to master's orders: Id.

Injunction will be refused, and party remanded to his action at law, when it appears that the trespass has already ceased, and damages are the main object of the suit: Ewing v. Rourke, 14 Or. 514.



**Trespass** (continued).

Mere trespasser, having had the use of real property, is liable to him who holds under color of title, for the value of the use: *Blumberg v. McNear & Co.*, 1 W. T. 141.

One claiming to own crops damaged by trespassing cattle proves a case sufficient to go to the jury, though on the trial in his direct case it is developed that part of the crop was owned by him jointly with another: *Washburn v. Case*, 1 W. T. 253.

**Trial.** See *Jury and Jury Trial*; *Practice*; *Reference*.

**Trover.** See *Conversion*.

**Trusts and Trustees.** See *Assignments*.

Witness under will may take trust estate in which he has no beneficial interest: *Hogan v. Wyman*, 2 Or. 302.

Executors, trustees of naked trust to sell and convey, need not qualify or report sale to Probate Court: *Id.*; *Brown v. Brown*, 7 Or. 285.

Patentee of lands from the United States is held a trustee for the rightful claimant, when the patent was issued to the wrong person: *White v. Allen*, 3 Or. 103.

Deed and confirmatory deed of land in trust for academy construed: *Chapman v. Wilbur*, 3 Or. 326.

How far assignment by trustee indorsed on confirmatory deed is evidence of his knowledge of the contents thereof: *Id.*

Where confirmatory deed alters the trust, what is ratification by the trustee: *Id.*

When a sale of the property to raise a fund for the trust purpose is valid: *Id.*

Unincorporated religious societies organized are capable of taking trust property for their benefit, and such trusts will be enforced: *Trustees v. Adams*, 4 Or. 76.

Trustees of such societies may sue for the benefit of the association: *Id.*

Grantor of property for a specific purpose may insist on specific execution of the trust, but diversion does not operate as forfeiture to him: *Chapman v. Wilbur*, 4 Or. 362.

Complaint by trustee of an express trust, which shows on its face that plaintiff is not the real party in interest, should show for whose benefit he sues: *Holladay v. Davis*, 5 Or. 40.

**Trusts and Trustees** (continued).

Entry of homestead under laws of the United States in trust for another is illegal, and will not be recognized in equity: *Clark v. Bayley*, 5 Or. 343.

Partner taking ferry and ferry franchise in his own name, bought with partnership property for the firm, held a trustee for the firm: *Knott v. Knott*, 6 Or. 142.

Property bought by husband with wife's money in his own name is held by him as her trustee: *Linnville v. Smith*, 6 Or. 202.

Executors as trustees under a will directing them to pay debts and hold the realty in trust for certain purposes have implied power to sell sufficient to pay the debts: *Brown v. Brown*, 7 Or. 285.

An order or confirmation of such sale by the Probate Court is not necessary: *Id.*

Person who has recovered possession of property by ejectment, but who is decreed in a suit in equity to have no right to the property, is held a trustee for the real owner: *Starr v. Stark*, 7 Or. 500; *Hill v. Cooper*, 8 Or. 254.

Such owner may recover the rents from the trustee in the suit in equity establishing the title: *Id.*

Equity may decree patentee of public lands a trustee for one having better equitable title: *Corpe v. Brooks*, 8 Or. 222; *Wardwell v. Paige*, 9 Or. 517.

Parol evidence is admissible to establish a resulting trust, but not to prove a conveyance of the interest of the *cestui que trust*: *Chenoweth and Johnson v. Lewis*, 9 Or. 150.

Parol agreement to sell interest as *cestui que trust* in land is void: *Id.*

Equity relieves from fraud, and in favor of innocent persons without fault creates constructive trusts: *Shively v. Parker*, 9 Or. 500.

Person cannot, in buying land, be held trustee for a corporation not yet in existence: *Kelly v. Ruble*, 11 Or. 75.

Purchaser of property of private corporation, in good faith, for an adequate consideration, is not a trustee for creditors of the corporation, though buying with notice of the debts: *Branson v. Oregon R'y Co.*, 11 Or. 161.

Attorney in fact, purchasing land from principal, a rela-

**Trusts and Trustees** (continued).

tive in a distant state, and not disclosing a better offer received by him for the property, abuses his trust, and the deed will be set aside: *Savage v. Savage*, 12 Or. 459.

Trustees of an insolvent estate are entitled to reasonable compensation: *Kinney v. Heatley*, 13 Or. 35.

But cannot appoint one of their number to manage the estate with commissions for sales and purchases: *Id.*

Trustee holding stock as pledgee, and allowing it to be sold, buying it in on his own credit and subsequently paying therefor out of the debtor's estate, holds the stock for the debtor: *Holladay v. Holladay*, 13 Or. 523.

Where a father takes a deed to land in the name of his infant son, and goes into possession and improves, his possession is his son's possession: *Lawrence v. Lawrence*, 14 Or. 77.

There is no resulting trust in favor of the wife proved, where husband took the deed in his own name, and paid the purchase-money, and for the improvements, and all the parties occupied the property as a family residence, and there was no written agreement: *Id.*

Trustee purchasing property in his own name, at the instance of and for the use of another, may maintain action concerning it in his own name: *Hexter v. Schneider*, 14 Or. 184.

Husband investing proceeds of donation claim, owned by himself and wife, in a farm, on which subsequently, for twenty years, both reside, holds an undivided half in trust for the wife: *Springer v. Young*, 14 Or. 280.

Failure of wife during coverture to establish her rights by suit is not laches: *Id.*

**Ultra Vires.** See Corporations; Municipal Corporations.

**Undertakings.** See Bonds and Undertakings.

**Undue Influence.** See Fraud and Deceit; Duress; Threats.

**Unincorporated Societies.** See Voluntary Associations.

**United States.** See Admiralty; Constitutional Law; Criminal Law; Public Lands.

**United States Army.** See Offices and Officers.

**Unlawful Assemblages.** See Riots.

**Usage.** See Customs.

**University.**

The board of directors of the State University is a corporation, and may be sued without joining the state as a party: *Dunn v. State University*, 9 Or. 357.

University is liable for salary of military instructor, where by its acts it has ratified his employment, and cannot refuse to pay on the ground that he was not engaged by formal vote: *Tyler v. T. of T. A. & P. U.*, 14 Or. 485.

**Use and Occupation.** See Landlord and Tenant; Mesne Profits; Trespass.

**Uses.** See Trusts and Trustees.

**Usury.**

Answer alleging usury must be specific, and must negative supposition of innocence: *Gaston v. McLeran*, 3 Or. 389.

Contract in note for reasonable attorneys' fees construed to mean the costs allowed by the statute, rather than usury: *Id.*

Under act of 1854, agreement to compound interest oftener than once a year cannot be enforced, but is not void as to principal and simple interest: *Murray v. Oliver*, 3 Or. 539.

Usury law of 1862 is constitutional, and contract in violation will not be enforced: *Chapman v. State*, 5 Or. 432; but see *Sujette v. Wilson*, 13 Or. 514.

Forfeiture of the debt to school fund carries mortgage security also: *Id.*

Court of equity has power, and under statute must declare forfeiture for usury: *Id.*

Assignee, *bona fide* before maturity, of usurious note acquires no rights: *Id.*

Note given for payment of interest on interest already due is valid: *Hathaway v. Meads*, 11 Or. 66; *Sujette v. Wilson*, 13 Or. 514.

Usury as a defense in equity must be strictly and clearly proved; the defense is not favored: *Poppleton v. Nelson*, 12 Or. 349.

District attorney has no right to intervene in a suit to claim the debt for the school fund: *Sujette v. Wilson*, 13 Or. 514.

Usury can only be declared upon a trial on issues framed



**Usury** (continued).

in the pleadings as to that question, and the proof must be clear and positive: *Id.*

Evidence reviewed and held not to establish usury: *Holladay v. Holladay*, 13 Or. 523.

Allegation that a note was in fact payable in Oregon, but was made payable on the face thereof in California, for the purpose of evading the usury law of Oregon, is a conclusion merely, and states no issuable fact: *Balfour v. Davis*, 14 Or. 47.

To constitute usury, there must be a loan, an understanding that the money shall be returned, an understanding that an illegal rate of interest be paid, and a corrupt intent: *Id.*

**Vacancy.** See Offices and Officers.

**Value.** See Damages; Eminent Domain; Evidence; Quantum Meruit; Sales.

**Variance.** See Nonsuit.

Proof of delivery of wheat in April, 1857, may be admitted to prove allegation "heretofore, to wit, about and previous to the first day of October, 1857": *Jackson v. Sharff and Hill*, 1 Or. 246.

A conviction for giving cannot stand under indictment for selling liquor: *Wood v. Territory*, 1 Or. 223.

Receipt for sixty-five dollars, as evidence to prove an indictment for forging a receipt for sixty dollars, is a fatal variance: *Shirley v. State*, 1 Or. 269.

Allegations of sums, names, dates, and the like must be proven as alleged: *Id.*

Proof of selling any kind of spirituous liquor will support indictment for selling particular kind of liquor alleged under a *videlicet*: *Frisbie v. State*, 1 Or. 248.

Discretionary with court to disregard variance; nothing but abuse of the discretion reviewable: *Brown v. Moore*, 3 Or. 435; *Henderson v. Morris*, 5 Or. 24.

If plaintiff desires to recover on contract different from that pleaded, he must get leave to amend: *Banks v. Crow*, 3 Or. 477.

To be material variance, adverse party must have been misled to his prejudice: *Hill v. Mellon*, 3 Or. 542; *Dodd v. Denny*, 6 Or. 156; *Roy v. Horsley*, 6 Or. 382.

When misled, proof must be made to the trial court, to

**Variance** (continued).

take advantage of section 94 of the Code (sec. 96, Hill's A. L.): *Id.*

On failure to prove written lease for two years, proof of verbal lease for two years is not admissible to establish lease for one year, good under statute of frauds: *Noyes v. Stauff*, 5 Or. 455.

Indictment for larceny of the property of A is not sustained by proof of the property of A and B, as partners, unless A had a special ownership therein: *State v. Wilson*, 6 Or. 428.

Proof of statement sworn to by person charged with perjury, differing in the date from the statement in the indictment, the variance was held material: *State v. Ah Sam*, 7 Or. 477.

Slight variance will not be considered on appeal; it is presumed that the pleadings were amended on the trial to conform with the proof: *Davidson v. O. & C. R. R. Co.*, 11 Or. 136.

Time alleged in complaint for slander need not be strictly proved: *Quigley v. McKee*, 12 Or. 22.

Variance not appearing affirmatively to have worked injury is no ground for reversal: *Tucker v. Flouring Mills Co.*, 13 Or. 28.

Complaint charging defendant as a common carrier, no recovery can be had on proof of liability as a private carrier only: *Honeyman v. Or. etc. R. R. Co.*, 13 Or. 352.

**Venditioni Exponas.** See Executions, and Proceedings Supplemental.

**Vendors' Liens.** See Liens.

**Vendors and Purchasers.** See Contracts; Deeds; Liens; Notice; Sales; Specific Performance; Statute of Frauds; Tender.

**Venue.** See Criminal Law; Replevin.

Larceny may be prosecuted in the state or county where the goods are taken by the offender: *State v. Johnson*, 2 Or. 115.

On motion for change of venue for convenience of witnesses, counter-affidavits may be heard: *Lander v. Miles*, 3 Or. 35.

Where suit brought to determine adverse claim to real property in wrong county, the defect is cured by subse-

**Venue** (continued).

quent change before answer by order of court: *Weiss v. Bethel*, 8 Or. 522.

Changing place of trial, on account of local prejudice, rests solely within the discretion of the court: *Ward v. Moorey*, 1 W. T. 104; *McAllister v. Territory*, 1 W. T. 360.

Court may of its own motion examine the public feeling, and properly make inquiries of the jurors touching the same: *Id.*

Actions for causes mentioned in section 48, Practice Act of 1877, must be brought in the county or district in which the subject of the action lies: *Wood v. Mastick*, 2 W. T. 64.

Venue of a crime in an indictment is sufficiently set out though the county is not stated, the crime being alleged to have been committed in the city of Seattle, the court taking judicial notice that Seattle is in King County: *Schilling v. Territory*, 2 W. T. 283.

**Verdict.** See Criminal Law; Jury and Jury Trial.

**Verification.** See Costs and Disbursements; Pleading.

**Vessels.** See Admiralty; Boats and Vessels; Liens.

**View.** See Jury and Jury Trial.

**Voluntary Assignments.** See Assignment for Benefit of Creditors.

**Voluntary Associations.**

Unincorporated religious societies may take trust property for their benefit: *Trustees v. Adams*, 4 Or. 76.

Trustees of such societies may sue for the benefit thereof: *Id.*

**Voluntary Conveyances.** See Deeds; Fraudulent Conveyances.

**Voluntary Payments.** See Contracts; Payments.

**Wagers.** See Gaming.

If neither party wins, each party has right to withdraw his deposit from stake-holder: *Bybee v. Burbank*, 2 Or. 296.

Wager on an election is illegal and void as against public policy: *Willis v. Hoover*, 9 Or. 418.

Money wagered may be recovered at any time before the event upon which it is ventured happens, if deposited with the opposite party: *Id.*

**Wagers** (continued).

If deposited with stake-holder, may be recovered at any time before paid to winner: *Id.*

What is sufficient demand from stake-holder: *Id.*

Purse or prize offered for the horse that will trot in the best time less than a given time is not a wager: *Misner v. Knapp*, 13 Or. 135.

There must be an element of chance of gain or risk of loss to constitute a wager: *Id.*

**Wages.** See Compensation.

In an action upon an agreement to pay a fixed rate, proof of reasonable value is not admissible: *Davis v. Mason*, 3 Or. 154.

Where contract to pay in gold coin for services is void for not being in writing, reasonable value may be proved under proper pleadings: *Id.*

When a son working on his father's farm is entitled to wages: *Albee v. Albee*, 3 Or. 321.

In action for wages, defense that plaintiff did not work diligently must be pleaded: *Id.*

Defense in an action for wages, that plaintiff was a pauper when taken into defendant's family, must be pleaded: *Bennett v. Stephens*, 8 Or. 444.

Promise to pay for services rendered by a pauper or relative taken into the family is not implied: *Id.*

Subsequent express agreement to pay such person entitles him to recover reasonable value: *Id.*

**Waiver.** See Appeal and Error; Criminal Law; Jurisdiction; Liens; Practice.

**Ward.** See Guardian and Ward.

**Warehousemen.**

Not chargeable with conversion, merely for mingling grain stored, with other grain: *Sears v. Abrams*, 10 Or. 499.

The identity of grain so stored is not lost, nor is it thereby placed beyond a lien thereon: *Id.*

Warehouseman's receipt is not negotiable, in the absence of statute: *Solomon v. Bushnell*, 11 Or. 277.

Receipt transferred carries no better title to the property than assignor had: *Id.*

But a symbolical delivery of the property may be made by assignment of receipt, where the receipt is to the bailor or his order: *Gill & Co. v. Frank*, 12 Or. 507.



**Warehousemen** (continued).

But where the warehouseman by his receipt restricts his undertaking to delivery to the bailor, a transfer of the receipt does not, without the warehouseman's consent, charge the possession of the property: *Id.*

Where several depositors have wheat stored in a warehouse, and a deficiency occurs without the fault of either, all must suffer loss in proportion to the amount of their wheat: *Brown and Goodman v. Northcut*, 14 Or. 529.

In such case, one who has received a larger portion than his ratable share is bound to account to the others for his proportion of the loss: *Id.*

But it seems that a depositor is not liable for a share of the loss, unless it occurred after he deposited his wheat: *Id.*

**Warrant of Arrest.** See *Arrest*.

**Warrants.**

Authority of secretary of state to draw warrants depends on prior appropriation: *Brown v. Fleischner*, 4 Or. 132. State treasurer presumed to know what appropriations have been made: *Id.*

He cannot pay, unless drawn on special fund, if not authorized to be paid from the general fund: *Id.*

Order of County Court to proper officer to receive and cancel certain warrants and pay them as other county warrants, which were previously issued to be paid out of a special appropriation, is discretionary, and cannot be reviewed: *Burnett v. Douglas County*, 4 Or. 388.

State treasurer must set aside a fund to pay warrants under centennial commission act: *Simon v. Brown*, 5 Or. 285.

He cannot pay such warrants out of the general appropriation act: *Id.*

County warrants in the hands of the treasurer duly canceled and indorsed are presumed paid to the indorser: *Portland v. Besser*, 10 Or. 242.

**Warranty.** See *Deeds*; *Insurance*; *Sales*.

**Waste.**

Injunction lies to restrain waste, threatened or being committed: *Sheridan v. McMullen*, 42 Or. 150.

To amount to waste, the injury must be permanent, or

**Waste (continued).**

tend to destroy the identity of the property: *Davenport v. Magoon*, 13 Or. 3.

May be accomplished by any material and substantial alteration of a building leased: *Id.*

Privilege in a lease to alter does not justify tearing down and building another building, though better: *Id.*

**Water and Watercourses.**

Construction of a conveyance of water power, with flowage unobstructed: *Or. Iron Co. v. Trullinger*, 2 Or. 312.

The right to flow back the water to the foot of the present wheel, and the right at all times to use all water which naturally flows below said mill, means the water as it flows from the mill-wheel, the mill being in operation: *Oregon Iron Co. v. Trullinger*, 3 Or. 1.

Right to use water implies right to dam, and reasonably detain, but not divert: *Id.*

What is an unreasonable detention is a question of fact generally: *Id.*

Water power which will be taken or rendered less valuable by corporation building canal may be considered by the jury as an element of damages in proceedings to condemn the right of way: *Willamette Falls C. & L. Co. v. Kelly*, 3 Or. 99.

How far navigation of streams above tide is governed by rules applicable to large navigable streams: *Weise v. Smith*, 3 Or. 445; *Shaw v. Oswego Iron Co.*, 10 Or. 371.

Ebb and flow of tide not the test of navigability in United States: *Id.*

Stream navigable for any purpose is to that extent subject to law regulating navigation: *Id.*; *Haines v. Welch*, 14 Or. 319.

So private stream navigable for logs, etc., is subject to such public use: *Id.*; *Felger v. Robinson*, 3 Or. 455; *Shaw v. Oswego Iron Co.*, 10 Or. 371; *Haines v. Welch*, 14 Or. 319.

How far such stream may be obstructed by booms: *Id.*

Right to touch upon banks of such stream founded on necessity: *Id.*

Riparian owner cannot deny the public the right to navigate such stream: *Id.*

**Water and Watercourses** (continued).

Question of necessity of fastening boom on such stream to plaintiff's land is for the jury: *Id.*

And so, what would be a reasonable time for removal thereof: *Id.*

The right to float logs between certain points does not justify their injuring dam at terminus: *Felger v. Robinson*, 3 Or. 455.

Stream need not be navigable for logs during the whole year to constitute navigable stream therefor: *Id.*; *Shaw v. Oswego Iron Co.*, 10 Or. 371.

Every proprietor of land through which water flows, above or below the surface, in a well-defined channel, has the right to its use without diminution: *Taylor v. Welch*, 6 Or. 198; *Shively v. Hunt*, 10 Or. 76; *Shook v. Colohan*, 12 Or. 239; *Weiss v. Oregon Iron etc. Co.*, 13 Or. 496.

But the rule does not apply to water percolating through the soil in an unknown channel: *Id.*

Agreement to convey land, mill privilege, etc., construed: *Brugger v. Butler*, 6 Or. 459.

The actual stream, and not the meander line improperly located by government survey, is the boundary of a riparian owner on a navigable stream: *Minto v. Delaney*, 7 Or. 337; *Weiss v. Oregon Iron etc. Co.*, 13 Or. 496.

Such owner acquires right to accretions, and land so formed cannot be entered by a stranger as swamp-lands: *Id.*

Riparian rights extend laterally into the stream, and include a reef of rocks connected with shore at low water, but do not extend up or down stream: *Moore v. Wilamette T. & L. Co.*, 7 Or. 355.

The United States can grant only to the meander line of high tide on navigable streams: *Hinman v. Warren*, 6 Or. 408; *Parker v. Taylor*, 7 Or. 435.

Land lying between high and low water belongs to the state, and can be sold by it: *Parker v. Taylor*, 7 Or. 435; *Johnson v. Knott*, 13 Or. 308.

Shore-owner may build wharves into the water, not obstructing navigation: *Id.*

Sale by shore-owner of lands not including tide-land owned by him does not give the purchaser the right to erect wharves on the tide-lands: *Id.*

**Water and Watercourses** (continued).

Erection of wharves in front of riparian owner's land may be enjoined: *Id.*

Water rights for mining or other purposes, secured by laws of the United States, cannot be lost by non-user alone short of the statutory period of limitation of real property rights: *Dodge v. Marden*, 7 Or. 456.

Such right may be extinguished by abandonment: *Id.*

Effect of abandonment for a year under the Oregon statutes: *Id.*

Reservation in grant of a lot bounded on tide-water, of all privileges around said lot, is a reservation of wharf rights: *Parker v. Rogers*, 8 Or. 183.

Instruction given in action against one not a riparian owner for diverting stream, held a correct statement as to riparian owners, but not pertinent in this case: *Hayden v. Long*, 8 Or. 244.

Custom of appropriating water, recognized by the laws of the United States as modifying the rights of riparian owners, must be alleged and proved: *Lewis v. McClure*, 8 Or. 273.

Agreement made by parol between property owners as to the division of a stream of water flowing through their lands, where partly performed, may be enforced in equity: *Coffman v. Robbins*, 8 Or. 278.

Where one buys land, he is presumed to buy with notice of the water rights on the premises: *Id.*

Grant of a right of way for a mill-race does not include a right to appropriate water flowing across the right of way on owner's land: *Miller v. Vaughn*, 8 Or. 333.

Such grant is an easement, and reservation of the water is not necessary: *Id.*

Grant of right of way to enter, build, repair, etc., ditches, on grantor's land, construed: *Spear v. Cook*, 8 Or. 380.

Act of 1880 (sec. 3496, Hill's A. L.), to protect salmon, does not apply to the Columbia River: *State v. Sturgess*, 9 Or. 537; S. C., 10 Or. 58.

To divert or obstruct a watercourse is a nuisance for which equity affords remedy: *Shively v. Hume*, 10 Or. 76.

Boundary of lands on streams in which tide ebbs and flows, and large navigable streams, is high-water mark,



**Water and Watercourses** (continued).

- but on all other streams is the middle of the river: *Shaw v. Oswego Iron Co.*, 10 Or. 371.
- It is the duty of a railroad company maintaining a ditch to protect adjoining proprietors from overflow: *Davidson v. O. & C. R. R. Co.*, 11 Or. 136.
- One claiming the right to overflow land by maintaining a dam must show a right to do so by grant, license, or prescription: *Wattier v. Miller*, 11 Or. 329.
- Such person cannot enjoin one in possession of the overflowed land from draining the same without showing a right to so overflow the land: *Id.*
- Such person must prove his right affirmatively, and not rely on the weakness of the title of him in possession: *Id.*
- A former decree having established defendant's right to divert a stream, it cannot again be litigated between the parties: *Neil v. Tolman*, 12 Or. 289.
- Rights of shore-owner on tide-water or navigable streams are not derived from the state, but are held in subordination to the rights of the public: *Wilson v. Welch*, 12 Or. 353.
- Covenant in a deed for division of a stream, and repairing dams in certain proportions, construed: *Salem v. Salem F. M. Co.*, 12 Or. 374.
- In an action for damages for overflowing plaintiff's land, a variance as to how the overflow was occasioned is immaterial on appeal, when the error does not affirmatively appear: *Tucker v. Flouring Mills Co.*, 13 Or. 28.
- Right to raise water of a stream to a certain stage is no defense to action for damages resulting from raising it above that stage: *Id.*
- Point where water usually rises in ordinary high water is the true meander line: *Johnson v. Knott*, 13 Or. 308.
- Lot-owner having granted right to erect wharf in front of his lot on tide-water, his grantee of the lot is estopped by his deed from objecting to its maintenance: *McCann v. Or. R'y Co.*, 13 Or. 455.
- Grant of riparian right by a donation claimant, prior to his obtaining patent by deed without covenant, passes no title: *Id.*

**Water and Watercourses** (continued).

City of Astoria has no power except to establish wharf line, as to erection of wharves on Columbia River: *Id.*

Riparian proprietor has no property in the water itself; a simple usufruct: *Weiss v. Or. Iron etc. Co.*, 13 Or. 496.

Is entitled to the use of the flow of water in its natural course and the momentum of its fall: *Id.*

May use the water if it is returned uncorrupted and without essential diminution: *Id.*

What is reasonable use is a question of degree, depending upon the size and capacity of the stream: *Id.*

Manufacturer cannot divert and discharge water in different channel without consent of lower owners, however beneficial his enterprise may be to the public: *Id.*

Injunction will issue at suit of riparian owner to prevent diversion of stream, though he suffers small damage, and uses little of the water: *Id.*

Where two settlers on government land severally divert a stream at a point above them, and subsequently one of them acquires title to land at such point, prior appropriation, and not common-law riparian rights, governs: *Kaler v. Campbell*, 13 Or. 596.

Under acts of Congress, settler by prior appropriation acquires a vested right which subsequent settlers above or below are bound by: *Id.*

Right to float logs down a stream does not include right to injure or trespass upon the banks, or to cause water to overflow to the injury of shore-owner: *Haines v. Welch*, 14 Or. 319.

Whether such injury was occasioned by negligence or not is immaterial: *Id.*

License from shore-owner to float logs down a stream confers no greater right on licensee than he would have without it if the stream is navigable: *Id.*

**Ways.** See Easements; Highways; Municipal Corporations.

**Wharves.**

Erection of wharves in front of plaintiff's land, which extends to high-water mark, may be enjoined: *Parker v. Taylor*, 7 Or. 435.

Shore-owner may erect wharves into the stream, not obstructing navigation: *Id.*

Deed of a lot bounded by tide-water, reserving all privi-

**Wharves** (continued).

leges around said lot, reserves wharf rights: *Parker v. Rogers*, 8 Or. 183.

Lot-owner having granted privilege of building wharf in front of his lot on tide-water, his subsequent grantee of the lot is estopped by his deed to object to the maintenance of such wharf: *McCann v. Oregon R'y etc. Co.*, 13 Or. 455.

Power of city of Astoria with reference to erection of wharves on Columbia River, within the city limits, is confined to establishing a wharf line: *Id.*

**Wills.** See Administration; Administrators and Executors; Legacies.

1. MAKING.
2. PROBATE.
3. CONSTRUCTION AND EFFECT.
4. SETTING ASIDE.

## 1. MAKING.

The making by the testator of his mark to his will is sufficient signing: *Pool v. Buffum*, 3 Or. 438; *Moreland v. Brady*, 8 Or. 303.

In such case, if a person writes the testator's name, it is not necessary to state that he subscribed the testator's name at the latter's request, unless it be done by testator's direction: *Moreland v. Brady*, 8 Or. 303.

## 2. PROBATE.

County Court has exclusive jurisdiction to probate, and a will is not admissible in evidence to establish title until it has been probated: *Willamette Co. v. Gordon*, 6 Or. 175; *Jones v. Dove*, 6 Or. 188.

Original will, after probate, does not have to be offered and proved when used as evidence: *Jones v. Dove*, 6 Or. 188.

County Court has exclusive jurisdiction, and its decree is conclusive until set aside: *Hubbard v. Hubbard*, 7 Or. 42.

Will must be re-probated when directly attacked, and the burden is on the proponent: *Id.*

In such case, new proof must be made in the same manner as when a will is originally probated: *Id.*

Proceedings in probate held regular, if from all the papers in the record jurisdiction appears: *Moore v. Willamette T. & L. Co.*, 7 Or. 359.

**Wills (continued).**

Objection that petition was not verified is waived if not taken at the time: *Id.*

**3. CONSTRUCTION AND EFFECT.**

Witness not disqualified from taking a trust estate in which he has no beneficial interest: *Hogan v. Wyman*, 2 Or. 302.

A will operates only on the property found actually to belong to testator: *Jette v. Picard*, 4 Or. 296.

Intention of testator is looked to in construing: *Humphreys v. Taylor*, 5 Or. 260.

Provision giving wife and minor children use of realty until disposed of by executor, legal: *Id.*

Parol evidence is admissible to make certain the person or thing described: *Jones v. Dove*, 6 Or. 188; *S. C.*, 7 Or. 467; *Moreland v. Brady*, 8 Or. 303.

When shown to have been duly executed, will is presumed to express the testator's unrestrained wishes, but the presumption is disputable: *Greenwood v. Cline*, 7 Or. 17.

Executors as trustees to pay debt and hold property for certain trusts have implied power to sell sufficient to pay debts: *Brown v. Brown*, 7 Or. 285.

Order of confirmation by Probate Court of such sale is unnecessary: *Id.*

Devise to trustees in perpetuity for benefit of a city is valid: *Id.*

Will, devising land described as a part of the land of Bartholomew Dove, may be introduced in evidence, to be followed by proof that Bethuel Dove was meant: *Jones v. Dove*, 7 Or. 467.

Bequest, "to be given to him when he is twenty-one years of age," is a vested legacy, and on the death of legatee before reaching that age his representatives take: *Warren v. Hembree*, 8 Or. 118.

Parol proof that testator did not own the lots named, but did own others in same block, admissible: *Moreland v. Brady*, 8 Or. 303.

In such case, the number of the lots is stricken out as false description, and the number of the block being left, is held sufficient description of the lots devised: *Id.*

Devise speaks from time of testator's death, unless the in-



**Wills (continued).**

tention appears otherwise: *Gerrish v. Hinman*, 8 Or. 348.

Devise to testator's living children, and to the children of his deceased children, construed to intend division of property *per stirpes*, and not *per capita*: *Id.*

Will of husband referred to in testatrix's will, which adopts its provisions, becomes a part thereof: *Gerrish v. Gerrish*, 8 Or. 351.

Children and grandchildren being named in the husband's will are deemed "named and provided for," within the statute in such case, by the testatrix's will: *Id.*

The object of the statute requiring naming of children in will, explained: *Id.*

Devise to A and her body heirs, with condition of reversion on A's death without issue, construed: *Rowland v. Warren*, 10 Or. 129.

Will, construed not to create a perpetuity, devising to daughters in being, with contingent remainders in their children, and certain executory limitations over: *Buchanan v. Schulderman*, 11 Or. 150.

Bequest to wife of absolute use and control, etc., for life, held to confer the "use," but not the consumption of the estate on her: *Leahy v. Cardwell*, 14 Or. 171.

Residue defined; it is ascertained when final account is presented and allowed: *Id.*

Residuary legatee is entitled to take when final account is presented and acted upon by the court: *Id.*

Such legatee is not chargeable with interest on notes given for funds belonging to the estate, after final settlement: *Id.*

**4. SETTING ASIDE.**

The nature and weight of evidence sufficient to set will aside for fraud and undue influence: *Greenwood v. Cline*, 7 Or. 17.

Testamentary capacity implies a knowledge of the property, and of the manner in which it is desired to dispose of it: *Hubbard v. Hubbard*, 7 Or. 42; *Heirs of Clark v. Ellis*, 9 Or. 128.

The character of the provisions of the will may be examined when undue influence is alleged, but is not

**Wills (continued).**

alone sufficient to set the will aside upon that ground: Id.

Not sufficient to show mere motive and opportunity of beneficiary to use undue influence, but that he did exert the undue influence: Id.

Acts done in course of administration under a will, which is afterwards set aside for the insanity of the testator, are valid: *Brown v. Brown*, 7 Or. 285.

County Court has jurisdiction in proceeding to contest will and revoke letters testamentary: *Heirs of Clark v. Ellis*, 9 Or. 128.

Insanity at the time of making the will is not presumed, where the nature of the testator's malady is occasional and temporary: Id.

Delirium in an aged infirm person distinguished from insanity: Id.

The test of capacity to make will is, whether testator's mind, at the time, was capable of knowing and understanding what he was doing, and to whom he was giving his property: Id.

**Witnesses.** See Costs and Disbursements; Evidence; Fees; Wills.

1. COMPETENCY.

2. CREDIBILITY.

3. EXAMINATION.

1. COMPETENCY.

Where two persons are jointly indicted, though tried separately, one cannot testify for the other until acquitted or convicted: *Latshaw v. Territory*, 1 Or. 141.

Witness not rendered incompetent by referring to a memorandum before being called: *White v. Allen*, 3 Or. 103.

Prosecutrix in a case of rape, though a child, must be sworn: 8 Or. 177.

There is no precise age beyond which children are competent; their understanding is the test: *State v. Jackson*, 9 Or. 457.

Discretionary with court to allow child to testify, and discretion not reviewable: Id.

Neither husband nor wife can, without consent of other, testify concerning communications made by the other during marriage: *Long and Spaur v. Lander*, 10 Or. 175.

**Witnesses (continued).**

Failure of attorney to object to such testimony does not render witness competent, but on appeal it is presumed consent was given: *Id.*

Witness, examined by the grand jury, whose name is not put on the indictment, may be examined by the prosecution, where the defendant is not misled as to his defense: *State v. Anderson*, 10 Or. 448.

Act of 1880, amendatory of section 166, Criminal Code (sec. 1365, Hill's A. L.), does not make co-defendants jointly indicted competent witnesses for each other: *State v. Drake*, 11 Or. 396.

Whether the acquittal of a co-defendant, thus rendering him competent, he being a material witness, is ground for new trial, *quære*: *Id.*

Who is an "intimate acquaintance," competent to testify as to sanity: *State v. Murray*, 11 Or. 413.

An accessory before the fact is not a competent witness on behalf of the prisoner: *Edwards v. Territory*, 1 W. T. 195.

Statutes of 1862-63 do not alter the rule of the common law in this respect: *Id.*

Right of adverse party to be examined as a witness, when the "assignor of a thing in action" has been so examined: *Glasford and Shield v. Baker and Cain*, 1 W. T. 224.

Exclusion of witness from testifying for the prisoner on account of drunkenness; when party entitled to new trial: *Fox v. Territory*, 2 W. T. 297.

In action by administrator against son of the deceased, for misappropriation of part of the estate, a brother of the defendant is competent witness in his behalf, not being interested adversely to the estate: *McCoy v. Ayers*, 2 W. T. 307.

**2. CREDIBILITY.**

Evidence laying ground for impeachment must be relevant: *Roberts v. Carland*, 1 Or. 332.

Inconsistent declarations are admissible to impeach, but are not evidence of the facts therein stated: *State v. Fitzhugh*, 2 Or. 227.

Party, witness for herself, cannot be impeached by her

**Witnesses (continued).**

letter, written to third person in language indicating that she is unchaste: *Leverich v. Frank*, 6 Or. 212.

Moral character cannot be impeached by evidence of particular acts: *Id.*

Particular facts called out on cross-examination of impeaching witness may be considered by the jury on the credibility of the witness impeached: *Steeple v. Newton*, 7 Or. 110.

Method of impeaching by inquiring into general reputation: *Page v. Finley*, 8 Or. 45; *State v. Clark*, 9 Or. 466.

Of impeaching by inconsistent statements: *State v. McDonald*, 8 Or. 113; *Sheppard v. Yocum and De Lashmutt*, 10 Or. 402; *State v. Abrams*, 11 Or. 169; *State v. Lurch*, 12 Or. 104; *Krewson & Co. v. Purdom*, 13 Or. 563; *Thompson v. Territory*, 1 W. T. 547.

In determining the credibility of a witness, the jury may consider the probabilities of truth of his statements from their own experience: *State v. Ah Lee*, 8 Or. 214.

Where witness has been impeached by proof of inconsistent statements, evidence of his reputation for veracity may be introduced in rebuttal: *Glaze v. Whitley*, 5 Or. 164; *contra*, *Sheppard v. Yocum and De Lashmutt*, 10 Or. 402.

Declarations of hostility by witness admissible, subject to same rules as inconsistent statements: *State v. Stewart*, 11 Or. 52; *S. C.*, 11 Or. 238; *State v. Mackey*, 12 Or. 154.

Defendant in criminal action offering himself as a witness may be cross-examined as to making contradictory statements, with a view to impeaching him: *State v. Abrams*, 11 Or. 169.

Only the substance of the contradictory statements imputed to a witness in the impeaching questions need be proved to impeach him: *Id.*

Error to instruct jury to disregard "mere slight variances" between witnesses: *State v. Swayze*, 11 Or. 357.

Whether or not witness came in obedience to subpoena, how far he traveled, and whether his fees were paid,



**Witnesses (continued).**

are immaterial, and jury cannot form inference from such facts: *Hurst v. Burnside*, 12 Or. 520.

Witness may, on cross-examination, be asked if he has ever been convicted of crime and confined in jail, and the record may also be introduced to prove the fact: *State v. Bacon*, 13 Or. 143.

The friendship, relationship, and bias of a witness may be shown by cross-examination: *Id.*

Subject to discretion of the court, a witness may be asked and required to answer any questions, however disgraceful, affecting his credibility, not criminating himself: *Id.*

**Examination** for the purpose of disgracing a witness, and not to show his credibility, should not be allowed: *Id.*

Witness may be asked if he has ever been arrested for crime: *Id.*

In criminal case, any question which shows the hostility of the witness should be allowed on cross-examination in favor of the defense: *State v. Mah Jim*, 13 Or. 235.

Upon redirect examination of witness who acknowledged hostility, the court permitted him to state the grounds of his hostility, against the objections of opposite party, but refused to allow the latter to disprove the matter so testified to; held, bad practice, but not error: *Bagley v. Carpenter*, 2 W. T. 19.

**3. EXAMINATION.**

Writing must be submitted to witness for inspection before examination as to its contents: *State v. Taylor*, 3 Or. 10.

Error to exclude a witness from testifying because he was present during the examination of other witnesses, against the order of the court, unless it appears that the party was in complicity with him: *Hubbard v. Hubbard*, 7 Or. 42.

But such witness may be fined for contempt: *Id.*

Discretionary with court to permit party during cross-examination to ask witness questions not relating to his direct testimony, subject to rules of direct examination: *Long and Spaur v. Lander*, 10 Or. 175.

**Witnesses (continued).**

Use of a diagram by a witness to locate and identify places and objects: *Sheppard v. Yocum and De Lashmutt*, 10 Or. 402.

Impeaching witness may be required on cross-examination to give all the conversation in which the contradictory statements are said to have been made: *State v. Abrams*, 11 Or. 169.

Witness may be asked on cross-examination if he told the attorneys what he would testify: *Id.*

Mode of examining intimate acquaintance as to sanity of defendant in criminal case: *State v. Murray*, 11 Or. 413.

In forgery case, witness for state, having testified that he did not sign the note, cannot be recalled by the state to write his name for comparison: *State v. Lurch*, 12 Or. 99.

Defendant, witness for himself, may be cross-examined only as to matters testified to on direct examination: *Id.*; *State v. Saunders*, 14 Or. 300.

So in forgery case, defendant cannot, on cross-examination, be made to write his name or other names, not having testified to such matters on direct examination: *Id.*

It is the duty of the court to interpose and keep cross-examination within reasonable bounds: *State v. Bacon*, 13 Or. 143.

In capital cases, great latitude should be allowed in favor of the defense: *State v. O'Neil*, 13 Or. 183; *State v. Mah Jim*, 13 Or. 235.

Counsel should be allowed to pursue their own course, so long as they keep within reasonable bounds: *State v. Mah Jim*, 13 Or. 235.

Witness may translate document written in a foreign language, though not sworn as an interpreter: *Krewson & Co. v. Purdom*, 13 Or. 563.

Parties cannot be excluded from the room during trial, under a statute giving court power to exclude witnesses: *Schneider v. Haas*, 14 Or. 174.

Right to face witnesses in criminal case is not denied the defendant by admitting dying declarations, or docu-

**Witnesses (continued).**

mentary evidence of collateral facts: *State v. Saunders*, 14 Or. 300.

Witness may refresh his memory by reference to bill of particulars in his own handwriting: *Williams & Co. v. Miller & Co.*, 1 W. T. 88.

Defendant, testifying, subjects himself to the rules controlling the examination of other witnesses: *Thompson v. Territory*, 1 W. T. 547.

**Women.** See *Husband and Wife*; *Jury and Jury Trial*.

**Writ of Error.** See *Appeal and Error*.





CITATIONS OF CASES

REPORTED IN THE

OREGON, WASHINGTON, DEADY, AND  
SAWYER REPORTS.

## LIST OF CHARACTERS USED.

<sup>A</sup> Approved.	<sup>M</sup> Modified.
<sup>C</sup> Cited.	<sup>O</sup> Overruled.
<sup>D</sup> Denied.	<sup>Q</sup> Questioned or doubted.
<sup>E</sup> Explained.	<sup>R</sup> Reversed.
<sup>F</sup> Followed.	<sup>†</sup> Criticised.
<sup>H</sup> Harmonized.	<sup>‡</sup> Distinguished.
<sup>L</sup> Limited.	S. C. Same case.

## CITATIONS OF CASES

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